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TRUST ESTATES AS BUSINESS COMPANIES

BY
JOHN H. SEARS
/11

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**To my Mother
this book is affectionately
dedicated**

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PREFACE

This work owes its appearance to the wide interest manifested in a booklet by the undersigned entitled "Effective Substitutes for Incorporation". This persuaded me that bona-fide business had become greatly discontented with corporations as supposed exclusive agencies for the employment of the aggregated capital of numerous investors. One of the most conservative states of our Union upon investigation was ascertained to be applying another idea to the problem, and satisfaction therewith was growing with experience. I thought that, if this idea had passed beyond the experimental stage in Massachusetts and was there being developed into larger usefulness, very probably it could be applied elsewhere. My investigation showed, as cases hereinafter prove, that the principal features had been used in other states and our mother country even before their employment in Massachusetts.

The book endeavors to plant itself upon those principles of jurisprudence, which have governed Courts of Equity in their enlightened conscience. Therefore there will be found herein no innovation in doctrine, but a mere adaptation of old principles to modern needs. The author considers that, if he may be thought to have presented those principles clearly and marshalled them in logical order, his efforts will achieve their greatest success. Upon this view the

work is submitted to the kindly, but discriminating, judgment of the profession.

Gratefully I acknowledge many helpful suggestions by my brethren in various parts of our country. Particularly do I acknowledge my indebtedness to Judge Needham C. Collier of the St. Louis bar for his assistance throughout the entire preparation of the work.

St. Louis, September, 1912.

JOHN H. SEARS.

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TRUST ESTATES AS BUSINESS COMPANIES

CHAPTER I.

EXPLANATORY.

§ 1. *The purpose of this book.*—This work is to consider to what extent arrangements may be made, whereby persons, natural or artificial, may transfer legal title in, and control and management of property to another or others for purposes of trade, at the same time not creating the relationship of principal and agent, though the profits or income are to belong to the transferors.

In other words, there is attempted in this book to discuss the attitude, that a trustee under a declaration of trust for the carrying on of a business may sustain to his contracts and acts in the management of such business, the liability generally and specially of the trust estate itself and the liability *vel non*, outside of their interest in the trust estate, of the creators or settlors of the trust for whose benefit it is established. Incidentally there will be noticed the principles, or such of them as seem germane or illustrative, in trusts for the continuing of businesses previously carried on by testators and where settlors may otherwise have established trusts embarked in trade, where the equitable interests are in third persons. It is, of course, to be conceded, as a general proposition, that, if one is the proprietor of a business, his personal liability is behind its acts and contracts, and if two or more are the proprietors there is a joint and several liability, no matter what may be their arrangements with each other. Such business is ordinarily carried on by an agent, if not personally conducted, and the acts of the agent are those of the principal, when within the scope or appar-

ent scope of the agency. Also, it is too well settled to need discussion, that, at law, this personal liability cannot be avoided, where the ultimate owners of a business establish it and provide for its being conducted, unless the title thereto be vested in a corporation, with no statute specifically affixing liability over to the ownership of paid-up stock.

It is thought to be well-settled, that a corporation is such a distinct legal entity apart from its shareholders, that it is necessary for any law authorizing its creation to declare expressly, that its shareholders are liable personally for its acts and contracts, or they will not be so held. This principle was clearly and adequately expressed by Judge Finch of the New York Court of Appeals,¹ as follows: "It is the essential and inherent characteristic of a corporation that it alone is liable for its debts, because it alone contracts them, except as that natural and necessary consequence is modified by some explicit command of the statute, which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common-law, is lost by their creation into a corporation, and exists thereafter only by force of the statute * * * so far preventing by the intervention of an express command, the total destruction of individual liabilities, which would flow from the inherent effect of the corporate creation."

All of this is to the effect, that, though in shareholders exists the right to create directors and limit their term of service and elect others, in their stead, in the way and manner and at the times prescribed, yet those directors are not the agents of those who appoint them, but of a distinct person, when acting within the scope of their agency.

¹People ex rel. Winchester v. Coleman (1892), 133 N. Y. 279
l. c. 284, 31 N. E. 96.

Thus far, and especially in connection with the further fact, that this artificial person is endowed, if not with immortality, at least with a certainty of continued existence in the full vigor of its primal creation, it might be thought, if there is no such "explicit command of the statute," as has been mentioned, it would be an academic discussion to pursue such a course as this volume purposes.

Nevertheless, as the corporation is the creature of statute, those who employ it as an agency accept the burdens along with the benefits that are expected. It has only such rights as its creator confers and these may be hedged about in their exercise by such regulations as that creator sees fit to impose. It is sufficient to say, without elaboration, that these rights differ in many respects from those which belong to natural persons, and especially in their being less absolute and more relative.

The growing complexity arising out of conditions, both intrastate and interstate, in the United States has produced and seems likely to continue to produce, a vast amount of legislation particularly regarding corporations. The privilege of corporate organization apparently has come to be considered, either so valuable as to stand the impact of all kinds of regulation, or so defenceless against statutory purpose as to make indulgence in their regulation the sport of legislatures. Therefore, it may not be the cause of wonder, that business and enterprise, demanding such aggregation of means as is afforded by the ownership of shares of stock in corporations, is seeking other agencies than corporations for their uses.

If, as is said by the Supreme Judicial Court of Massachusetts² associates interested in a business enterprise may obtain "most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations," and, if this is true, there at least is presented a choice between association for such a purpose and corporations.

²Hussey v. Arnold (1904), 185 Mass. 202, 70 N. E. 87.

This volume, it is hoped, may supply useful suggestion, based upon decided cases, for an intelligent solution of the problem in the choice of a corporate entity, or of a method arising out of a purely contractual relation, for the conduct of business by the use of aggregated capital not belonging to a partnership.

§ 2. *Not Advocated as a Method of Escaping Legitimate Responsibilities.*—The fact that advantages seem to be offered over other methods of business organization should not be taken, however, as evidence that the plan set forth in this book is not consistent with the public interest in matters of business control and regulation. Indeed, it is thought, that the trust relation thus established is the ideal toward which much corporate legislation has striven and will continue to strive, in vain.

That combinations in business in a trust form are readily made amenable to what appears to be the public interest is aptly attested by the experience in the United States with the so-called "trusts" in restraint of trade. These at one time consisted of arrangements whereby the title to stock in various prior competing corporations were vested in trustees, who controlled the action of the various companies, not through any direct authority, however, to operate the business, but by their votes at corporate meetings.³ Transferable trustee certificates were issued to the various former stockholders of the corporations. These "trusts" were declared illegal, in the first of the cases just cited, because the controlled corporations were made parties to the agreement, and the act as to them was held to be *ultra vires*, in that corporations had no right to combine, except in the mode prescribed by statute. In the other case, the corporations were not made parties to the trust instrument, but the court looked beyond the terms of the instrument and the fiction of corporate entity and followed the holding in the New York case, on the ground that the separate entity of corporations would be disregarded in an instance of this kind, and the act was nevertheless a corporate act and an *ultra vires* one, and that "the agreement of organi-

³People v. North River Sugar Refining Co. (1890), 121 N. Y. 582; State ex rel. v. Standard Oil Co. (1892), 49 Ohio St. 137.

zation was in and of itself in restraint of trade and amounted to the creation of an unlawful monopoly."⁴ Combines then found a more secure harbor of refuge in the "holding" corporations.⁴ They have abandoned the trust form, and the legislation by the Federal and State governments against combination in restraint of trade, commonly called "anti-trust laws," no longer has any particular significance in an exact use of the word. These "anti-trust" laws have been referred to as a recognition by inference, from their terms, of the legality of business trusts, wherein "restraint of trade" is not attempted.⁵ However, we are not concerned in this work with the subject of restraint of trade, and only make the above reference in this introduction, as illustrative of the fact that the trust form has not been found to be particularly suited to the evasion of anti-monopoly legislation, and to bring the reader's attention to the fact that such legislation in no way interferes with the embarking of trust estates in legitimate businesses, the only kind of business with which this book is concerned.

The word "trust" as is perceived, has taken on, in common parlance, an ambiguous meaning, its more modern application having something of sinister import. This book treats the word in its older and better sense and endeavors to show the principles it stands for are not only applicable to present business needs, but will conduce to placing business on a higher plane.

§ 2a. *Difficulties of Corporations as to Changing Statutes.*—As business expands into new states and countries it finds that the fundamental principles of trade are alike everywhere, with the principal exception, however, that, if such business is clothed in the corporate form, it finds that it is placed under diverse and discordant views as to what its rights and liabilities are. The corporate status is created and regulated by statutes.

⁴U. S. v. Standard Oil Co. of New Jersey (1911), 221 U. S. 1, l. c. 41.

⁵Francis Lynde Stetson on "The Government and the Corporations" in the Atlantic Monthly for July, 1912.

These statutes differ in different localities and at different times in given localities, owing to the experiments of legislators in attempting to bring about various reforms. It is practically impossible for a corporation doing business over a wide territory to have that assurance of its rights which a sound and stable business demands. It must keep constantly on the alert to guard itself against the enactment of new legislation, and must keep counsel constantly at work to ascertain what the meaning of new laws is. It often happens that, as soon as a particular question has been decided by the courts, the law construed has been repealed and a new one put in its place, of which construction must be had at the cost of litigation and uncertainty before its effect will be known. The resistance of corporations to statutory regulations gives rise to a popular belief that corporations are not law abiding bodies, although the corporation may be resting its resistance upon just grounds. The corporation must, in opposing what appears to be destructive legislation, pay the price of an unpopularity which reacts in further legislation or in unfavorable verdicts by juries. In the true sense of the words, therefore, it cannot be said that corporations stand before the law with the same rights as individuals.

The indefinite and variable notions entertained according to times and places, and the temperaments of courts, in their application to corporations, have a detrimental effect upon not only the activities of business itself, but upon the confidence of those who supply the means for new business, namely, the investors.

§ 2b. *Distinction as to Trust Estates in Business.*—It is thought that trust estates embarked in business will not be subject to such uncertainty. They bring to their legal support, a long line of authority based upon broad principles applicable thereto and irrespective of statutory experiment. The moral advantages to all concerned, will, in our opinion, excuse them in the future from a great many statutory restrictions placed upon corporations. Only such parts of the subject as seemed of particular interest to the question in hand have been treated in this book. Accessory problems are fully discussed

in treatises on Equity Jurisprudence and its branches in a manner highly satisfactory to the legal profession. It is hoped this work will stimulate return to a wider use of those books and the adaptation of their principles to modern conditions; that they will be glad of a surcease from the literalism of ill-drawn statutes, unending annotation of cases and ceaseless inpour of text-books which are mere instances in statutory construction, like a tessellated floor on a foundation of sand.

§ 2c. *Personal Responsibility in Corporate and Trust Management.*—The impersonal character of a corporation as a merely legal entity has rendered easy the shifting of all kinds of responsibility. It has encouraged the erection of a being which purchases from a promoter at an inflated price, under pretense of its being an independent purchasing power. It has merged companies independent of each other and natural rivals, so as to control their activities through what is known as a holding company, while all are held out to the world and their several stockholders as acting independently. So much, indeed, has this practice prevailed, that directors are mere figure heads so far as the policy of each corporation is concerned, as they are governed by others who may not even possess the qualifications required by statute to become a director. This method necessarily derogates from all theory of trust and confidence supposed to be reposed and makes of charters themselves hollow shams reflecting a sort of immorality upon corporate business.

Out of this situation has grown a tendency in legislation to deal with directors and other officers of corporations in a strictly personal way, both civilly and criminally. The trust estate system hereinafter expounded should relieve business of much of the odium that corporate abuse has created, for at least, it may be thought that the personality of a trustee in equity can hardly be lost in the estate he manages as that of a director has been, in the corporation he represents. As old as the trustee idea is that tendency has not yet appeared with it.

But of these and other considerations, it seems best, that the

reader should be informed, as they are unfolded in treatment, preliminary questions being first disposed of.

§ 3. *Plan of Treatment.*—To secure a comprehensive grasp of the precise nature of the plan of business organization here under consideration, the reader is advised to examine one or more of the “Agreements and Declarations of Trust,” set forth in the back of this book under the title of “Exhibits,” before taking up the text proper beginning with Chapter II.

The arrangement and order of Chapters is designed to supply answers somewhat in the following sequence of inquiry:

- (1) Is the general plan a legal one?
- (2) Are the equivalents of corporate advantages, namely (a) exemption of shareholder liability, (b) transferable shares, (c) continued existence, and (d) limited number of necessary parties to litigation, legally and practicably attained?
- (3) Does the arrangement stand on as good or better basis as regards taxation?
- (4) May trust assets in business be managed as well and practicably as those of corporations?

If the reader resolves these questions affirmatively, then he will be prepared to consider, whether there are advantages, either general or special, or as suited to particular enterprises, possessed by trustee management over that by a corporation. Generally speaking, the following advantages may be thought to exist:

- (1) The doing of business upon the common law right of contract with freedom from all statutory exactions that may be imposed upon corporations both foreign and domestic, as merely artificial persons.
- (2) The right of trustees to apply to Courts for direction in the execution of their powers, and thus their acts be given legal certainty in advance of their commission.

(3) The protection of *cestuis que trust*, in their dealings with trustees, their right to accountings and full information, without the right, however, of securing information for improper purposes.

(4) The protection of creditors in "following" the "trust fund," and their right against trustees individually in cases of fraud.

(5) The freedom with which the terms of a trust instrument may be framed for the conduct of a particular business and according to the lawful preference of its equitable owners.

(6) Latitude in amendment of provisions of management, as experience may show is desirable.

(7) The winding up of a business expeditiously and without resort to proceedings at law, with their consequent burden of delay and expense, under express provisions of the trust instrument, upon any termination of the trust.

Incidental to a part of the foregoing, the practical experience in Massachusetts with these trusts is recited and suggestions afforded for the drawing up of agreements establishing such trusts, together with other instruments incident to their management and operation, the work closing with exhibits of trust instruments used by trust estates in actual operation.

As the strict relation of trustee and *cestui que trust* must never be forgotten nor derogated from, it has been sought to stress the necessity of there being a complete devolution of the legal title in the trustee and his absolute right, so far as third persons are concerned, to control the trust estate for all purposes within the scope of the trust instrument and bind it by his acts and contracts, the principles of equity governing his responsibility to his *cestuis que trust*.

CHAPTER II.

VARIOUS METHODS OF ESTABLISHING A TRUST ESTATE IN BUSINESS.

§ 4. *Trust Estate Embarked In Business Created By Wills.*—It has often occurred, both in England and in the United States, that a testator has wished to provide for the continuance of a partnership business after his death. Thus in *Ex Parte Richardson*,¹ where a partnership of which testator was a member was carried on after his death, the question before the court for decision was whether or not, upon the partnership becoming insolvent, his general estate was liable to its creditors. It was said by Sir John Leach, V. C., that: "A trustee under a will, carrying on a trade, pledges the trust property given to him for that purpose and also his own property; but what is the trust property given to him for that purpose must depend on the terms of the will." In this case, other money of the estate was used in the business and this was allowed to be proved as a debt against the partnership in bankruptcy, and this allowance was sustained. Similar instances of the creation of such trusts are found in other English cases.² Of American cases there appears a decision by the Federal Supreme Court,³ in which the opinion was by Mr. Justice Story. This opinion recites that the will, after giving sundry legacies, provided by a codicil for the testator's interest in a partnership continuing until the expiration of the term limited by the partnership articles, with the surviving partner to conduct the

¹(1818), 3 Maddock's Ch. 79.

²*Hankey v. Hammond*, 1 Cooke's Bankruptcy Law 67; *Ex parte Garland* (1803), 10 Vesey 110; *Raybould v. Turner* (1899), 82 L. T. (N. S.) 46.

³*Burwell v. Mandeville's Executor* (1844), 43 U. S. (2 How.) 560.

business and the profits and losses to be distributed as the articles declare. This partner was not the executor. The partnership becoming insolvent, it was sought to make the general estate of testator liable for its debts. The language of the Justice in denying this claim is interesting as showing, at least as to a trust embarked in trade by testamentary provisions, how strict is the rule as to the trust fund or property being completely segregated from the rest of the estate. He said: "Nothing but the most clear and unambiguous language, demonstrating in the most positive manner, that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely limit it to the funds embarked in that trade, would justify a court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off legacies or distributing the residue, without in effect saying that the payments may all be recalled, if the trade should become unsuccessful or ruinous." And yet it could well be argued, that, as the partnership was to be continued, as by the articles thereof provided, with the same division of profits and losses as before, it was intended each partner should stand as before, that is to say, jointly and severally liable for its debts. Instead, however, this interest was decreed to stand as a completely segregated interest from the remaining estate, with the surviving partner the trustee thereof.

This ruling was later approved by the same court.⁴

§ 5. *Trust Estate Created By A Single Settlor With Himself And Others As Cestuis Que Trust.*—In an Ohio case the owner of a business set it apart as a trust estate by means of a declaration of trust, he to share in the income and profits to arise out of the continued conduct of the business, with the trust to continue or not after his death upon the happening or not

⁴Smith v. Ayer (1879), 101 U. S. 320. See also Pitkin v. Pitkin (1829), 7 Conn. 307, 18 Am. Dec. 111; P. C. & St. L. Ry. Co. v. Schmidt (1894), 8 Ohio, C. C. 355.

of a certain contingency.⁵ Its existence as a trust estate was recognized. But there was a question as to personal liability for its debts, because of its management as a business after the time, when, by the provisions of the declaration of trust, the trust was to cease. For this wrongful act, induced by the consent of the former *cestuis que trust*, they were held personally liable for its debts. In a Massachusetts case there is found an instance of a single settlor conveying to certain trustees an invention with full and exclusive rights of application for patents in this and foreign countries. The trustees were to hold, manage and control said patents and dispose of the same or any interest therein. The settlor's interest was represented by scrip for one half and money for the carrying on of the business was raised by payments by scripholders as to the remaining half interest. The question was as to the liability of the scrip owners as partners and it was held that they were not liable for the debts created by the trustees, thus plainly recognizing the validity of this trust arrangement.⁶

§ 6. *Trust Estate Created By Debtor With Himself And Creditors As Beneficiaries.*—Instances are frequent where by arrangement between a debtor and his creditors a business in embarrassment may be continued by deed of trust vesting the legal title in a trustee, with the creditors primary beneficiaries, and the trust to cease upon their indebtedness being satisfied. One of the most notable English cases of this character is *In re Stanton Iron Company*,⁷ wherein a partnership conveyed to trustees its business to be conducted under a new name for the benefit of creditors joining in the deed of trust, the overplus to be reconveyed to the partners. Sir John Romilly, M. R., said: "The question is really whether the deed constituted a partnership thereto, so as to bring it within the provisions of the Winding up Acts. I have two things to consider—the relation in which the parties to the deed stand to each other, and their relation to third parties. There can be no doubt that persons

⁵Adams v. Nelson (1893), 1 Ohio Dec. 216.

⁶Mayo v. Moritz (1890), 151 Mass. 481, 24 N. E. 1083.

⁷(1855), 21 Beav. 164.

may be partners towards the world, and yet not be partners as between themselves. But on the other hand, persons who are partners between themselves are necessarily partners as respects the public." Then construing the provisions of the deed he concluded it neither made the creditors partners between each other nor did it hold them out to the world as partners. He then observed: "I see no ground for supposing that they could under any circumstances be held personally liable to the creditors in respect to the management of the business." The arrangement, therefore, was deemed one to which legislation respecting partnerships had no application.

§ 7. *Trust Estate Created by Debtor With Himself And Creditors as Beneficiaries—Continued.*—The case of *Cox v. Hickman*,⁸ decided five years after the *Stanton Iron Company* case, was a deed of trust by traders with like provisions. This case was an appeal from a decision by Justice Blackburn⁹ who took the view that the creditors stipulated for such control over the business as made them partners as to debts created by its conduct, Justice Crampton concurring on the ground that the trustees were really managers or agents and not trustees, though so denominated. This view was overruled upon great consideration by eleven out of nineteen judges, the Law Lords all being with the majority. It was held that by the deed there was committed, along with the conveyance of the legal title, such management and control in the trustees as made the creditors not proprietors but merely *cestuis que trust* thereunder, with no personal responsibility for the debts created by the trustees.

§ 8. *Trust Estate Created by Debtor With Himself and Creditors as Beneficiaries—Continued.*—This ruling was much relied on in a like case decided by the Supreme Court of North Dakota,¹⁰ the court holding that by the terms of the deed of trust the entire management and control of the business con-

⁸(1860), 9 C. B. (N. S.) 47.

⁹S. C. (1860), 8 H. L. C. 268.

¹⁰(1898), *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460; 75 N. W. 914.

veyed was devolved upon the trustee. This case was an action seeking to hold the creditors, who joined in the deed of trust executed by their debtor, liable, jointly and severally, as partners, and asking also for a personal judgment against the debtor, upon indebtedness created by the trustee subsequent to the deed. It was held that neither the creditors nor their debtor was liable beyond the trust fund. The court said: "If the trust is valid—and that point does not seem to be controverted—then the trustee became personally liable on every contract made by him in the discharge of the trust. * * * * He is not in the position of a mere agent." This, however, was not regarded as the conclusive test, but it was thought that this and the fact of absolute control over the trust property passing to the trustee created an estate, as to which all antecedent relations became immaterial. This and other cases hereinbefore cited will be again referred to in questions considered later on.

§ 9. *Several Persons Originating Trust Estate For Their Proportionate Benefit.*—This may be accomplished through articles of association in a joint stock company with transferable shares or by simply contributing money or property to this end without the issuance of such shares. These methods will be shown, in inverse order, by reference to adjudicated cases. Thus in *Mallory v. Russell*¹¹ there was a trust deed agreement executed by two persons associated for the purpose of buying and selling land. The legal title of all land to be purchased was to vest in a trustee, who was to have sole management and control of the business thus created. The parties to the agreement were to contribute money and acquire a beneficial interest in proportion to the amounts respectively contributed. The court said: "The contract itself rebuts the idea that persons who paid their money in aid of the enterprise became seised of any interest in the land." Therefore, it was held that the widow of one of them had no dower right in any of the land of which the trustee held the legal title. Cases like this one are rare, however, because quite generally enterprises of this character have behind them a large number of people and it

¹¹(1887), 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776.

is more convenient, as well as making their several interests more marketable to follow the plan used by corporations of issuing to contributors certificates or shares.

§ 10. *Trust Estate—In Pursuance to Articles of Association for Unincorporated Company.*—Vesting title in a trustee or trustees for the carrying on of a business whose profits are to be divided among shareholders in a joint stock company, whether in a state or country where there are statutory provisions regarding such a company or not, appears in many cases decided by courts of last resort. Never, however, does it appear to have been held, except in an isolated case,¹² that a trust deed was void where the title was in trust for an unincorporated association “and for the several use and benefit of the several members thereof according to their respective interests, as the same thereafter may be determined by division or otherwise.” It was said: “The association had no legal existence and the trust deed gives no intimation as to who were the persons associated under that name”. This case, however, seems to confirm, by its very exception, claim for the legality of establishing a trust as to any number of persons in their own interest, if the proper *indicia* for identification of beneficiaries appear. Merely as illustrative we give, in this chapter, a limited number of the many cases, hereinafter to be referred to, of active business trusts operated in the interest of shareholders in unincorporated associations. In England a very notable case¹³ appears. In stating its effect it should be said that the contention revolved around the question whether or not an association, whose members being more than twenty persons, were, as shareholders, *cestuis que trust* in a business, established by means of a deed of settlement, came under the English Companies Act of 1862 requiring it to be registered upon pain of being an illegal partnership. The Master of Rolls, in the lower court, said: “It does appear to me that this is as plain a company or association formed for the transaction of business for the purpose of gain as could be put fairly into words, if

¹²German Land Assn. v. Scholler (1865), 10 Minn. 331.

¹³Smith v. Anderson (1880), 15 Ch. D. 247.

you change names and nothing more. If you call the certificate holders 'shareholders' and call the trustees 'directors' and call the association a 'company', changing those three names, you have about as simple a description of an ordinary company under the Act as, I think, you can well have." Thereupon he condemned the arrangement as a "mere device and a very transparent one to endeavor to escape from the plain meaning of the enactment."

§ 11. *Smith v. Anderson Continued.—Ruling On Appeal.*—Three Lords Justice reversed this holding upon the ground, that there was no carrying on, nor intent to carry on, any business by the associates. The only business that was to be carried on was by the trustees, one of the Lords saying: "Here it seems clear that according to the true construction of the deed, they (the trustees) were not directors or agents, but trustees. If that be so, the certificate holders, even if they were associated at all, were not associated for carrying on the business. It was not their business. They could not have been made liable for any contract made by the trustees." Other English cases will be cited and discussed hereinafter.

§ 12. *Trust Estate—In Pursuance to Articles of Association for Unincorporated Company—Continued.—American Cases.*—In Massachusetts this method in the creation of a trust estate for the conduct and control of a business has been frequently resorted to. In one of these cases¹⁴ the equitable character of an estate vested in a trustee for the purpose of carrying on a business, which had become insolvent, was distinctly declared to the extent, that it could not, under Massachusetts practice, be proceeded against in an action at law. In another case,¹⁵ C. J. Putnam speaks of "sundry members of what is commonly known as 'a voluntary joint-stock association' organized in Massachusetts under a so-called 'trust deed'." It was held that, under the pleadings, its fund only was liable upon a promissory note

¹⁴Hussey v. Arnold (1904), 185 Mass. 202, 70 N. E. 87.

¹⁵Bank of Topeka v. Eaton (1901), 100 Fed. 8, affirmed in 107 Fed. 1003 47 C. C. A. 140.

upon the face of which there was a restriction of personal liability on the part of the trustee. These and other Massachusetts cases will be hereinafter cited and discussed. In North Dakota,¹⁶ in New York,¹⁷ in Illinois,¹⁸ in Texas,¹⁹ and in Pennsylvania,²⁰ decisions treat of trust deeds vesting property in trustees to carry on business for the benefit of certificate holders in unincorporated associations.

§ 13. *Summary.*—Thus it appears that it is by no means novel or unusual that trust estates should be created either for embarking in a new business or continuing an old one, and the legal and equitable status of such estates ought to be well defined, as also the relations they and their trustees and their *cestuis que trust* bear to each other and to third persons with respect to their acts and contracts arising in the course of the existence of such estates.

¹⁶*Spotswood v. Morris* (1906), 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665.

¹⁷*Ward v. Davis* (1850), 3 Sandf. 502; *King v. Townshend* (1894), 141 N. Y. 358, 36 N. E. 513; *Cross v. Jackson* (1843), 5 Hill 478.

¹⁸*Hart v. Seymour* (1893), 147 Ill. 598, 35 N. E. 246.

¹⁹*Willis v. Greiner* (1894), Tex. Civ. App. 26 S. W. 858.

²⁰*Pittsburg Wagon Works' Estate* (1903), 204 Pa. St. 432, 54 Atl. 316.

CHAPTER III.

THE NATURE OF A TRUST ESTATE.

§ 14. *Status of Trust Estate Exemplified by Decisions.*—It is unimportant in this treatise to go into refinements marking evolution of the trust doctrine in England, which happily for this country there ended in putting it upon a stable foundation prior to our separation from the mother country. It suffices for our purpose to indicate by a few adjudicated cases the firm distinction between a trust and a legal estate. In a well considered case in Massachusetts¹ there was a question as to a devise to executors of a fund in trust to invest as they deemed prudent and pay the net income semi-annually to a *cestui que trust* during his natural life, with such income “free from interference or control of his creditors”, with “the use of said income * * not to be anticipated by assignment”. The opinion cited English authority which held that the income could not be made inalienable.² It was said in the Adams case, as representing the English view that: “By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor income is at any time inalienable.” But the Massachusetts court said that many American courts have rejected the English view, and hold instead that “the founder of a trust may secure the benefit of it to the object of his bounty,

¹Broadway National Bank v. Adams (1882), 133 Mass. 170, 43 Am. Rep. 504.

²Brandon v. Robinson, 18 Ves. 429; Green v. Spicer, 1 Russ & Myl. 395; Rochford v. Hackman, 9 Hare 475; Snowdon v. Dales, 6 Sim. 524.

by providing that the income shall not be alienable by anticipation, nor be subject to be taken for his debts," citing cases in the note.³

§ 15. *Rule Where Settlor Creates Trust For His Own Benefit.*—In a case decided by the Massachusetts court on the same day of the decision in *Broadway National Bank v. Adams*, *supra*, the question was whether a married woman, possessed in her own right of personal property, which she conveyed to trustees to pay the net income to her semi-annually during her life "upon her sole and separate order or receipt, the same not to be by way of anticipation", with remainder to her children, could pledge her income in advance of its accruing.⁴ The controversy revolved around the validity of the clause in quotation marks, recognized by the court as the equivalent of that found in the *Adams* case. The court said: "The general policy of our law is, that creditors shall have the right to resort to all the property of the debtor except so far as the statutes exempt it from liability for debts. But this policy does not subject to the debts of the debtor the property of another, and is not defeated when the founder of a trust is a person other than the debtor. In such case, the founder, having the entire *jus disponendi* in disposing of his own property, may, if he sees fit, give to his beneficiary a qualified and limited, instead of an absolute, interest in the income. * * * But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to put his own property out of the reach of creditors, while he retains the beneficial use of it. * * * It is true that a man, who is not indebted, may by a voluntary conveyance made in good faith transfer his property so as to put it out of the reach of his creditors. When a man transfers a trust fund, of which the

³*Holdship v. Patterson*, 7 Watts 547; *Shankland's Appeal*, 47 Pa. 113; *Rife v. Geyer*, 59 Pa. 393; *White v. White*, 30 Vt. 338; *Pope v. Elliott* 8 B. Mon. 56; *Nichols v. Eaton*, 91 U. S. 716; *Hyde v. Woods*, 94 U. S. 523.

⁴*Pacific Bank v. Windram* (1882), 133 Mass. 175.

income is to be paid to him during his life, and the principal at his death to be paid or transferred to others, the principal may be beyond the reach of his creditors; but we are of the opinion that his right to the income which he retains himself may be alienated by him, is liable for his debts and may be reached in Equity.”

In a Maryland case,⁵ there is the same reasoning and distinction found in the two Massachusetts cases above referred to, with the incident of the income being declared for the maintenance and support of the “immediate family” of the grantor. It was said: “There is no such separate, independent and defined interest in the family, as to enable its members, whoever they may be, to enforce the trust in their favor,” which ruling aids in realizing the vigor existing in a competent method for the creation of a trust where beneficiary and interest are well defined.

§ 16. *Rule Where Settlor Creates Trust For His Own Benefit—Continued.*—In Missouri cases by comparison one with the other and the later expressly approving the former cases, it is shown that restrictions may be placed by the founder of a trust in favor of another upon alienation of income, while if he creates a trust in favor of himself, the restriction is nugatory.⁶

In the older of these cases an alleged interest in the title to certain realty of the beneficiary in the income for life of a trust estate was levied on and sold under execution against him. It was conceded that the deed creating the trust was by the nominal purchaser from this beneficiary and that he was in effect the founder of the trust. It was provided therein, that the income was to be paid to him quarterly for life, and should he attempt to anticipate its accrual in any way, this should operate, to that extent, in making it a fund to be kept by the

⁵Warner v. Rice (1886), 66 Md. 436.

⁶McIlvaine v. Smith (1867) 42 Mo. 45, 97 Am. Dec. 295; Lampion v. Haydel (1888), 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. Rep. 358.

trustee for the benefit of the remaindermen. A petition in equity was brought by the purchaser at execution sale to have the trustee pay to the plaintiff the income during the life of the beneficiary. In this case it was declared that a judgment creditor of the beneficiary could, by bill in equity, have the rents and profits, notwithstanding the restrictions upon alienation created by a donor himself a beneficiary, applied in satisfaction of his debt. But when it was attempted to sell the interest as a life estate, upon execution sale, nothing passed. Speaking of the purchaser at such sale the court asked: "What interest did he take? By the terms of the deed, during his life the trustee is to control and manage the property, to make loans and receive the rents and profits, to pay all the taxes, charges, insurance and other expenses and to pay over to (founder) at the end of each quarter, during his life, 'the net product of said property', under the restrictions mentioned, with remainder over and a power of appointment as therein expressed. This gave him a vested life estate in the net product of which the trustee could not deprive him by the exercise of any discretion." By this case it is seen, that, though the donor had reserved to himself the exact equivalent of a life estate, yet it was not an interest in the land at all, but merely a vested interest in its income, only to be reached by a proceeding in equity.

§ 17. *Dry or Passive Trust Distinguished From Active Trust.*—The cases which we have referred to all relate to trusts in which their nature is prescribed by the creating instrument and along with the vesting of the legal title in the trustee is given possession of the property, which the trust embraces. In other words, the trust fund or estate is under his control according to prescribed limitations. A simple or dry trust has been said to exist "When property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of law".⁷

In some jurisdictions these trusts are not recognized, but such

⁷Perry on Trusts, 6th Ed. sec. 520.

an estate vests directly in the beneficiaries.⁸ But whether so or not, the trustee holds neither possession nor control of the property, and the *cestui que trust* controls the use and has the right to direct the trustee to execute whatsoever conveyance to another he sees fit.⁹ Nevertheless, it required a statute to prevent even a dry trust from having a very positive effect on property under statutes of distribution. Thus it is said by the author last cited that: "According to the law previously to the Statute 3 and 4 Will. IV Ch. 105, no dower attached upon a mere equitable estate of inheritance."¹⁰

Now, however, the trustee, where there is a simple or dry trust, has merely a three-fold ministerial duty: (1) To permit the *cestui que trust* to occupy and receive the income and profits of the estate; (2) To execute such conveyances or make such disposition of the estate as the *cestui que trust* may direct and (3) To protect and defend the title or allow his name to be used for such purpose.¹¹ Nevertheless, it is seen that even a simple or dry trust has some, though a minor, influence in distinguishing an equitable estate from that where the real owner possesses the legal title both in form and in fact.

§ 18. *Summary.*—The authorities above cited, which are merely illustrative and capable of multiplication indefinitely, show, that even a dry but especially an active trust is a distinct lawful entity, as much so as a legal estate, and where the instrument of creation empowers the trustee to manage and control it, that he is free from any sort of restraint upon the part of *cestuis que trust*, when acting within the limits of his authority. We have seen also that the rule is the same as to this freedom, whether the founder of the trust creates the estate solely for the benefit of another or for his own benefit for life with remainder

⁸Ala. Code 1907, sec. 3408; *Sutton v. Aiken* (1879), 62 Ga. 733; *Long v. Long* (1883), 62 Md. 33; *Farmers' Nat'l. Bank v. Moran* (1883), 30 Minn. 165.

⁹Hill on Trustees, pp. 316, 317.

¹⁰(*ibid* page 316.)

¹¹Perry on Trusts (6th Ed.) Sec. 520; Hill on Trustees, p. 317.

over after his death. Whether a founder may create a trust estate with provision merely for income for his benefit without providing for the ultimate disposal of the principal, that is to say, so as to make his interest to consist solely in income, is to be considered hereinafter. At all events, however, so far we have ascertained that a founder may create a trust for his own benefit, so that his right to exercise control thereof shall cease. In other words, he can found an estate, out of which he reserves the income to himself for a fixed time, and make the principal inalienable by himself, and not subject to his debts and contracts subsequently created.

Elaborate treatises on trusts and trust estates all presuppose, if they may not specially consider, this result, as otherwise they would be merely academic. This result, however, is all of which there is need for the subject in hand. To attempt anything more would be merely to compile definitions more or less accurate.

CHAPTER IV.

JOINT SETTLORS CREATING TRUST FOR THEIR ENTIRE BENEFIT.

§ 19. *Single Settlor Creating Trust for Benefit of Himself and Another.*—We have seen that a single founder may create a trust and reserve to himself an interest less than the fee of the property conveyed. Perhaps there has never been a *bona fide* attempt by a single settlor to do anything more than this. The nearest approach to the contrary is found in a case already referred to,¹ where a founder conveyed to trustees his property for the benefit of scrip-holders who were to pay into the trust fund the amounts for which they were to receive scrip, the settlor to be also entitled to scrip in one-half of the whole capital, and, yet, it was not the same, because thereby he became a contributor to the trust just as they. If a settlor, however, were to declare that his property should be held in trust with the income to be payable to him during life and made no provision as to what should become of the principal at his death, it may well be doubted whether that principal would not be alienable by him and subject to his debts as a present interest. However that may be, it is of no special importance here.

§ 20. *Several Settlers Creating a Dry Trust for Their Own Benefit.*—Just as it has been held that a single settlor might create a trust in his own property for himself and others contributing a fund for its better employment in business, *a fortiori*, perhaps, may it be said that two or more, one in consideration of his being joined by the other or others, may create a trust fund or property, the income out of which shall be for the several benefit of the founders of the fund. Thus in another Massachusetts case² a trust was formed for the convenience of an

¹Mayo v. Moritz (1890), 151 Mass. 481, 24 N. E. 1083.

²Howe v. Morse (1899), 174 Mass. 491, 55 N. E. 213.

unincorporated association in renting and selling land. The existence of the trust was evidenced by a declaration of trust that certain land was held by the declarants as trustees for said association. In this declaration the trustees appear as such of a dry or simple trust because the entire management of the estate was committed to the directors of the unincorporated association. It further appears that the association had a capital stock divided into shares and that the income was to be distributed as it accrued ratably among the shareholders. The court held that there was a valid trust and that the equitable interests represented in shares were constantly vendible. Thus it appears that, even in and by means of a dry trust, several settlors may provide a trust fund for their exclusive benefit without more, for the trust declarants were not themselves the founders of the trust, but the shareholders were. To save the trust against the objection that it was void under the rule against perpetuities, the vendibility of these shares and their being subject to debts of the shareholders were relied upon. These facts and the further fact that the association could at any time direct the trustees to sell the land showed there was no withdrawing of property from commerce. We shall hereinafter see that provision against both objections may be made by limiting the duration of a trust.

§ 21. *Several Settlers Creating a Dry Trust For Their Own Benefit—Continued.*—In an earlier Massachusetts case³ the declaration of trust provided that the Executive Committee of an unincorporated joint stock association should have general management of property vested in trustees with the members to be the equitable owners. The interest of each member was to be represented by transferable shares, and their status as *cestuis que trust* was fully recognized. If a share represents the entire interest of a *cestui que trust*, then a declaration of trust so providing is a means of founders or settlors creating a trust for their own exclusive benefit, and that the trust being passive may make these founders or settlors liable as partners for its acts

³Hoadley v. County Comrs. (1870), 105 Mass. 519.

and contracts is another question. In a later case⁴ than the one last above cited the court thus expressed itself as to interests being wholly included in transferable shares: "The peculiar feature that the interest of each member may be transferred without the special assent of the other members is created by agreement of the partners under their natural rights at common law." This language was used where the firm property was the equitable interests of its members in property the legal title to which was vested in trustees under a declaration of trust. It may be said, however, that there ought to be no sensible distinction in making an entire interest in a legal estate represented by a transferable certificate and doing the same as to an equitable interest.

Another passive trust,—passive at least in the sense that the management of the trust estate was to be in a board of managers even though the trustee may have been given some special powers—is found in another Massachusetts case.⁵ In the opinion by Judge Holmes after saying it was provided that: "The decease of a member of the association shall not work a dissolution of it (association), nor shall it entitle his legal representatives to an account or to take any action in the courts or otherwise against the association or the trustees for such; but they shall simply succeed to the right of the deceased to the certificate and the share it represents subject to this declaration of trust," held there was a partnership liability under such provision against the estate of a deceased shareholder, because he was the owner of a transferable share saying: "When, as here, a company is made as nearly a corporation as possible, and it is obviously intended that the death of a shareholder shall not affect either the company or the rights incident to the share, we think that the liabilities go with the rights." It thus appears that this provision which specifically limited all beneficial interests to ownership of shares was held to be a valid provision, though the shares were in a fund, the legal title to which was in a trustee. The personal liability held to exist in this case de-

⁴Gleason v. McKay (1883), 134 Mass. 419.

⁵Phillips v. Blatchford (1884), 137 Mass. 510.

pending, as we think will be hereafter shown, on the fact of management being reserved in the association.

In a New York case⁶ the court did not deem it necessary to inquire whether trustees were those of a dry or a special trust, but it was ruled, that, in a conveyance from A to B, C and D described as trustees of a certain named land association, it would be presumed they held the legal title for a partnership of individuals dealing in real estate, in which the grantees had or may have had a beneficial interest. A Pennsylvania case⁷ shows a dry or passive trust, the trustees of which held the legal title to real estate in trust for an association, the articles of which provided that the interest of each member should be determined by the number of shares he held, and that the only way he could dispose thereof was by transfer on the books of the association. It was ruled that the interest of each member was personal property, and no levy on the real estate held by the trustees could affect the individual interest of a member. This certainly means the entire interest of each *cestui que trust* was in the shares owned by him.

§ 22. *Settlors Creating Active Trust For Their Exclusive Benefit.*—In a case where there was a declaration of trust by an inventor in favor of himself and other scrip holders in an unincorporated association, as *cestui que trust*, his and their interests therein to be represented by scrip or certificates of stock,⁸ the complete control and management of the property was to follow the vesting of the legal title in the trustees. *Gleason v. McKay* and *Phillips v. Blatchford*, *supra*, were distinguished, the court, composed of practically the same members as in those cases, saying: "This deed does not have the effect to make the scrip holders partners. It does not contemplate the carrying on of a partnership business upon the joint account of the grantor and the scrip holders, and in this respect the case is unlike" those

⁶*King v. Townshend* (1894), 141 N. Y. 358, 36 N. E. 513.

⁷*Pittsburg Wagon Works' Estate* (1903), 204 Pa. 432, 54 Atl. 316.

⁸*Mayo v. Moritz* (1890), 151 Mass. 481, 24 N. E. 1083.

cases. But it can hardly be said the grantor was the sole founder of the trust, because the fund was contributed to by him and the scrip holders and yet it was said "the invention is held in trust and is trust property". The evident distinction is that the trust was an active one under the entire control of the trustees, while the partnerships in the other cases actually operated the trust property as a business, while the trustees were merely holders of title. But in the three cases the interests were represented by transferable shares.

The same idea of vesting absolute control in trustees divesting the business of its partnership character, though its *cestuis que trust* constitute an association we have seen to have been expressed in a noted English case.⁹ In this case the members were held to be mere investors carrying on no business that would bring them under the English Winding Up Acts relating to partnerships. It is true that the only question involved in these cases was as to personal liability of certificate or scrip holders, but it was necessary to adjudge validity of the trust to hold the *cestui que trust* released from liability.

§ 23. *Settlors Creating Active Trust For Their Exclusive Benefit—Continued.*—In a case decided by the Federal Supreme Court¹⁰ it is recited, that a joint stock company, an unincorporated association was formed in 1836 by several persons for the purpose of dealing in the purchase and sale of lands. By the articles of association the lands purchased were to be conveyed to trustees to hold as joint tenants in trust for the members of the association. Its capital was divided into forty-eight shares and was held in unequal parts according to sums severally contributed by the members. The trustees were vested with entire control during the continuance of the trust, which was to cease when enough money was realized from sales by the trustees to satisfy all the purchase money, improvements, interest, taxes and assessments, and a division of the lands, if any

⁹Smith v. Anderson, 15 Ch. D. 247. *Ante.* §§ 10-11.

¹⁰Clagett v. Kilbourne (1861), 66 U. S. (1 Black) 346, 17 L. Ed. 213.

remaining, was to be among the shareholders. A judgment creditor of one of the shareholders owning one-sixth of the total shares levied on certain lots, the legal title to which was in the trustees, and they were sold to him at the sheriff's sale. He then brought ejectment against the purchaser of these lots from the trustees. The court said: "The proceeding assumes that the share of the judgment debtor in the association is an interest in lands; and though the legal title be in the trustees, is liable to be seized on the execution and sold and the purchaser put in possession. The settled law is otherwise. * * * * In this case the legal title is in the trustees who are bound to account to the stockholders, the *cestuis que trust*, according to their respective shares after all the debts of the association have been paid." It seems as clear here, as is possible to make the matter, that a trust designed by founders for their exclusive interest as shareholders of an association was recognized as a valid trust, under the active management of a trustee. The court said: "It is quite clear the plaintiff has mistaken his remedy, as he obtained no title, legal or equitable, to the particular lots in question."

§ 24. *Settlors Creating Active Trust For Their Exclusive Benefit—Continued.*—In an Illinois case¹¹ several persons entered into a written agreement to engage in the business of buying, improving and selling business property and by the agreement they appointed three of their number trustees to take legal title to land purchased and to subdivide and sell same, exercising general control of the affairs of the association. There was to be capital stock divided into shares. The agreement reserved the right to give directions to the trustees at a general meeting of shareholders by a majority vote, or to remove a trustee by a two-thirds vote. The question at bar was whether a deed for a purchase by the trustees at sheriff's sale running to (A B and C) "trustees of the Norwood Land and Building Association" and "to their heirs and assigns forever" was to be taken as conveying an absolute title to A B and C individually, or if they took the land in trust and if in trust was the convey-

¹¹Hart v. Seymour (1893), 147 Ill. 598, 35 N. E. 246.

ance void. The court holding first that the word "trustees etc. was not *descriptio personarum* merely, unless there was incapacity in the beneficiary to take, thought that there was no incapacity, and the members of a co-partnership acquired interests "to be determined by the trust agreement and by that alone." The court said also: "There can be no doubt that the trust thus created was an active one, and one which involved the exercise of powers and the performance of duties which rendered it necessary that the trustees should hold the legal title, in order to secure the performance of such duties and the execution of such powers," which fact, as distinguishing a conveyance to a trustee of an active trust from a trustee of a dry trust, operates, as held in some states, to make "the trusts or uses remain mere equitable estates."

§ 25. *Summary.*—This character of cases both as to dry and active trusts might be extended at greatly more length, but, after all, these cases would be merely illustrative of the application of well-known principles. It is deemed, therefore, sufficiently shown, that there is no more novelty in claiming that two or more founders or settlors may create a trust fund of property, the entire interest in which may be vested in themselves severally, than that the capital stock of a corporation may be vested in its shareholders, and the title to the capital or principal may be in the trustees they appoint just as it is in a corporation. With these questions settled, as it appears to the author they are settled, the various relations parties to a trust agreement for an active business trust bear to the trust, to each other and to third persons for its acts and contracts, may now be considered.

CHAPTER V.

LIABILITY OF TRUSTEE OF AN ACTIVE TRUST.

§ 26. *Independent Status of a Trustee.*—As to how a trustee stands to a trust estate, to creditors and to beneficiaries or *cestuis que trust*, has not been found anywhere more tersely and yet more comprehensively expressed than by Justice Woods of the Federal Supreme Court.¹ The learned Justice said: “A trustee is not an agent. An agent represents and acts for his principal who may be either a natural or artificial person. A trustee may be defined, generally, as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another. When an agent contracts for his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts, as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is, therefore, the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promissor of the name of trustee or any other name of office or employment will not discharge him. Of course, when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof. If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate.”

¹Taylor v. Davis (1884), 110 U. S. 330, 334, 28 L. Ed. 163.

§ 27. *Independent Status of a Trustee—Continued.*—In the case from which the foregoing excerpt is taken it appears that there was an action at law upon a written promise by trustees under a deed of settlement to pay certain demands of a former trustee against the trust estate out of moneys coming into the hands of the trustees, as such. This coming into their hands of such moneys was shown and the judgment of the lower court against the trustees, personally, was affirmed. The principle of personal liability is thus expressed by a standard work:² “In the present state of the law, no trustee could be advised, under any circumstances, to undertake the responsibility of carrying on any trade for others. For by so doing he adopts the same risks and liabilities as persons who trade on their own account, while he can participate in none of the profits; and, as a matter of ordinary prudence, a trust for such a purpose should be unhesitatingly declined.” This consideration no doubt has been the main reason why corporate organization has been preferred to trusts for carrying on trade. But in the evolution of business methods, especially, we may say, in the growth of indemnity insurance and express stipulation against liability, in a personal way, the conclusion, that was drawn fifty years ago from the existence of the principle stated, may be greatly qualified now.

§ 28. *Rule of Trustees' Personal Liability Stringent.*—As seen in the closing sentence of the excerpt from *Taylor v. Davis*, *supra*, the trustee must stipulate not to be personally liable or he will be so held. This is with equal emphasis announced in many other cases, some of which we proceed to set forth. Thus in a case from Rhode Island,³ the trustees indorsed a promissory note. They were sued at law as individuals. They pleaded it was their duty under the will of the founder of the trust to indorse negotiable paper of certain corporations of which the maker of the note in suit was one, and the suit, so far as the indorsers were concerned, should be brought in equity, it being also averred that plaintiff, holder of the note, knew at the time

²Hill on Trustees (4th Am. Ed. 1867) 534.

³Roger Williams Nat'l. Bank v. Groton Manfg. Co. (1889), 16 R. I. 504, 17 Atl. 170.

of its issue of the provisions of said will. The Supreme Court upheld the ruling of the lower court, sustaining a demurrer to said plea and rendering judgment against the trustees, personally, citing a great number of cases.⁴ The opinion says: "Although it has sometimes been stated as a reason why the trustee is held personally liable upon his contracts as trustee, is because he has no power to bind the trust estate, he being likened to an agent who has exceeded his authority, we think the true reason why he is held personally liable on such contracts is that he has no principal, or, rather, he is the principal himself. The contract is therefore necessarily his and his alone. But, however this may be, we do not think that the fact that the defendant trustees were empowered by the will, and it was made their duty to indorse the notes in suit, is sufficient to relieve them from personal liability upon their indorsements, they not having stipulated that they were not to be so liable." It was urged by counsel for the trustees that to hold them personally liable "is to punish them for the faithful performance, within the limits of their powers, of the trust imposed on them, well known to the plaintiff." The court as to this, said: "The situation of the trustees, if the trust estate be insufficient to indemnify them fully for the debts which they have contracted, is indeed hard, but it is one in which they have voluntarily placed themselves, and, though we may sympathize with them, we cannot on that account relax the rules of law in their behalf."

§ 29. *Stipulation Effective Against Personal Liability.*—The foregoing cases may be thought necessarily to indicate that

⁴Fogg v. Virgin, 19 Me. 352; Blackstone National Bank v. Lane, 19 Me. 352, 13 Atl. 683; Comes v. Clark, 12 Cal. 168; Taft v. Brewster, 9 Johns. 334; Hills v. Bannister & Butler, 8 Cow. 31; New v. Nicoll, 73 N. Y. 127; Thacher v. Dinsmore, 5 Mass. 299; Forster v. Fuller, 6 Mass. 58; Fiske v. Eldridge, 12 Gray 474; Packard v. Nye, 2 Metc. 47; Bloom v. Wolf, 50 Iowa 286; Hayes v. Crutcher, 54 Ind. 260; Hayes et al. v. Matthews, 63 Ind. 412; Bingham v. Stewart, 13 Min. 106; Wren v. Hoffman, 41 Miss. 616; Aven v. Beckom, 11 Ga. 1; Johnson v. Gaines, 8 Ala. 791.

there is no method of a trustee avoiding personal liability where he makes a contract in behalf of a trust estate, unless he stipulates with the other party to a contract that only the trust estate shall be liable. They do not decide, except argumentatively, however, that he may be saved from personal liability by expressly stipulating therefor. There are a number of cases, however, where this question was directly involved. Thus in a case from North Carolina,⁵ a trustee was sued personally for goods ordered, as trustee, and so charged to him on plaintiff's books. Defendant testified that before purchasing he had an agreement with plaintiff for the trust estate to be solely liable, and this was denied by plaintiff as a witness. The court instructed that the burden was on plaintiff to show that the sale was to defendant individually, and there was a verdict for defendant. The case was reversed, the court saying: "In this (instruction) we think there was error. The answer of defendant was in the nature of a plea of confession and avoidance. Having admitted that he obtained the goods, he assumed the burden, and nothing else appearing, the plaintiff would be entitled to judgment. A trustee purchasing goods, or incurring any other liability on account of his trust, is personally liable for the payment thereof unless his liability is limited by an agreement, expressed or implied, with the creditor. The liability of the trust estate is not now before us, the only question being the individual liability of the defendant. It is admitted the defendant might have limited his liability by such an agreement with the plaintiff as he alleges, but having alleged such an agreement he must prove it." The case therefore was remanded, defendant to prove the agreement alleged, if he could.

§ 30. *Stipulation Effective Against Personal Liability—Continued.*—In a Massachusetts case,⁶ defendants were sued at law on a promissory note, which in the body thereof stated that "we as trustees, but not individually, promise" etc., and then signed their names with the word "Trustees" added. The court

⁵Mitchell & Co. v. Whitlock (1897), 121 N. C. 166, 28 S. E. 292.

⁶Shoe & Leather Nat'l. Bank v. Dix (1877), 123 Mass. 148.

said: "If a party in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else and in no event to be personally liable, he certainly cannot be rendered so by law." The words of the note were held an express stipulation to this effect. It was urged "that if these defendants are not liable on the contract as a note, then nobody is liable." The court replied: "Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves, we need not decide whether they have or have not bound their principals." This case was approved in a later decision by the same court.⁷

§ 31. *Stipulation Effective Against Personal Liability—Continued.*—It would seem a work of supererogation to extend the citation of authority any further on this subject, especially as cases referred to hereafter necessarily go upon the necessary presumption, that a stipulation of this kind is valid, but the observation of a distinguished Federal Circuit Judge, in a case in which his opinion was pointedly approved by the Circuit Court of Appeals,⁸ is so apt that it ought not to be omitted. In this case a promissory note was sued upon. It read: "Sixty days after date the trustee of the Topeka Land & Development Company, as such trustee under declaration of trust, dated May 23, 1887, and not otherwise, promise to pay" etc., and signed by the trustee with the words "as trustee as aforesaid" following his signature. Judge Putnam said: "The only question is whether or not this implied stipulation of the plaintiff, limiting its remedy to the general assets of the association and the property especially pledged to it, is contrary to the rules of law. Of course, a stipulation in an instrument which fundamentally violates its essential nature must sometimes be rejected by the

⁷Hussey v. Arnold (1904), 185 Mass. 202, 70 N. E. 87.

⁸Bank of Topeka v. Eaton (1900), 100 Fed. 8; aff'd. 107 Fed. 1003, 47 C. C. A. 140.

courts. For instance, if any individual or partnership should stipulate in this or its pecuniary obligations that he or it should not be personally liable thereon, without at the same time mortgaging or pledging property or giving some other specific lien for security, it might be difficult for the law to regard the stipulation, because in that event, as there would be no lien which the law could enforce, the holder of the obligation would be left without remedy, unless he could proceed by judgment against the obligor; and the result, if sustained, would be an obligation, which in law is no obligation. The present case, however, assimilates itself to the large class of cases, where certain property being pledged in some form for the security of a debt, the parties have been at liberty to stipulate that the owner of the debt should look only to the property thus pledged. In the present case, not only did the Bank of Topeka have specific assets given to it for its security, but the entire property of the association was held in trust, and therefore subject to administration by the Chancery Courts, which could apply it equitably and proportionally to the discharge of obligations of the trustee, as contemplated by the express direction of the Articles of Association that the debtors of the trust should look for payment solely to its property."

§ 32. *Discussion of Above Ruling.*—This excerpt embraces some matters to be hereinafter considered, for example, responsibility of the trust estate for the acts and contracts of the trustee, but the reason of the rule for the validity of a stipulation for exemption of a trustee from personal liability is so well expressed, where the question of that validity was directly involved, that it ought to appear. By that reason it is shown that the power of a Court of Equity over a trust estate places it where it stands like property specifically pledged. It may be placed out of reach of creditors, possibly, by sale or disposal by the trustee, but not by the mere creation of indebtedness, where vigilant creditors would secure advantages over others, but if misfeasance or nonfeasance were wasting assets, a Court of Equity might interpose. In a word a trust estate is always actually or potentially in the custody of a Court of Equity,

and for this reason its trustee may stipulate for exemption from personal liability in its management. The rule is not an unreasonable one as to indebtedness rightfully created under the provisions of an instrument creating a trust, and, if the indebtedness is not of that character, the creditor may be in fault in permitting it to be incurred under color of authority.

§ 33. *Liability of Trustee For Negligence in Management of a Trust Estate.*—That trustees are liable in their personal capacity for acts of negligence seems not seriously disputed. Generally the question is whether or not the estate he represents is also liable. Thus in a North Carolina case⁹ an action at law was brought where a railway company leased to a trustee and operated by him was sued as also was the trustee, in his official capacity. It was chiefly urged that the latter could not be sued in his official capacity and the trust estate held responsible for his negligence. The court in this case held the trust estate liable as an exception to the general rule, that only the trustee would be liable saying in reference to *Taylor v. Davis*, *supra*, and *Mitchell v. Whitlock*¹⁰ that: "In neither of these cases was it held that the trust estate could not also be held responsible to the creditor. * * * * And in the present case, no doubt, the defendant Morrow (Trustee) could have been sued and held liable as an individual, because the intestate was one of his employees." This case will be again referred to when the question of liability of the trust estate is considered.

§ 34. *Liability of Trustee For Negligence in Management of a Trust Estate—Continued.*—In a Rhode Island case,¹¹ non-liability of the trust estate was held in a cause of action arising out of negligence by the servants of the trustee, the court reasoning as follows: "The declaration shows that the legal title to the premises in front of which the accident happened

⁹*Wright v. Caney River Ry. Co.* (1909), 151 N. C. 529, 66 S. E. 588, 19 Am. & Eng. Anno. Cas. 384.

¹⁰(1897) 121 N. C. 166, 28 S. E. 292.

¹¹*Parmenter v. Barstow* (1900), 22 R. I. 245, 47 Atl. 365, 63 L. R. A. 227.

was in the defendants at the time of the happening thereof, and that they were in the possession and control thereof. And, while it appears from the declaration that the beneficial interest in the estate belongs to others, yet, as the absolute legal title thereto is vested in the defendants, the law devolves upon them, in their personal capacity, all of the ordinary duties and liabilities which are incident to the ownership of real estate. They are not the agents of the beneficiaries, for a trustee is not an agent, in the strict sense of the term, and hence the relation of master and servant does not exist, so that the liabilities which trustees incur by their misconduct or negligence are personal liabilities." In a Massachusetts case¹² the trustees were sued for negligence in the running of a railroad. These trustees were such under a mortgage for the benefit of bondholders and upon default entered into possession and continued its operation under a verbal agreement. It was held that, as the trustees were in control with no superior power above them, they therefore were principals. It is to be said of this case, that the trustee idea is not dominant, but the fact that those, who were trustees, were put in control as individuals.

§ 35. *Liability of Trustee For Negligence in Management of a Trust Estate—Continued.*—In an English case,¹³ the only question was whether or not a judgment creditor of the trustee sued in tort for negligence arising out of his acts as a trustee could have his judgment satisfied out of the trust estate. The case ruled that, if the trustee having paid such a judgment was entitled to indemnity, then the creditor should not be made to "go through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate." This case shows that the liability of the trustee may be more extensive than the liability of the trust estate, whether to the trustee for indemnity or to the party to whom he has become individually liable. Recovery by either from the trust estate is based on the trustee's right

¹²Ballou v. Farnum (1864), 9 Allen 47.

¹³In re Raybould (1900), 1 Ch. 199, 82 L. T. N. S. 46.

to indemnity and that depends on whether the trustee "has acted with due diligence and reasonably."¹⁴

§ 36. *Liability of Trustee For Negligence in Management of a Trust Estate—Continued.*—In another Massachusetts case,¹⁵ there was an action brought against a corporation for negligence of the janitor of a building leased to it. Several months after the lease an assignment was executed to certain trustees "giving them full power and authority to hold, manage and control the property for the remainder of the term under certain trusts, for the benefit of assignor and others." According to the terms of this instrument, neither the defendant nor anybody else had any right to interfere with the management and control of the trustees so long as they properly executed their trust, and the trustees were not accountable for their conduct of the business, except for the proper performance of their duties under the instrument. The court said: "It is plain the janitor was their servant and not the servant of the defendant. If there was any liability of a master for his conduct as a servant Mr. B. and Mr. H. (Trustees) were liable and not the defendant."

§ 37. *Summary.*—These illustrative cases, announcing well settled principles, enable us to take up the next subject in the development of our purpose, viz: The right of the trustee to indemnity out of the trust estate.

¹⁴Ibid.

¹⁵*Falardeau v. Boston Art Students' Assoc.* (1903), 182 Mass. 405, 65 N. E. 797. See also *Curry v. Dorr* (1912), 210 Mass. 430, 97 N. E. 87.

CHAPTER VI.

TRUSTEE'S RIGHT OF INDEMNITY.

§ 38. *Preliminary Observations.*—Necessarily as this work progresses in the manner adopted for the clearer establishment of the propositions in its text, that is to say, by copious excerpts from decided cases, many things are quoted which forecast what is to be repeated further along. This, it is thought, should not be regarded as redundancy, because in every excerpt there is obviated the objection that the proposition stated is not supported by the context in which the principle is found. In this way the authorities relied on may be distinguished or found to be adequate or not.

§ 39. *Trustees' Right of Indemnity.*—Recurring to the language of Justice Woods,¹ we see that he announces, generally, that: "When a trustee contracts, unless he is bound, no one is bound, for he has no principal," and "the trust estate cannot promise." Nevertheless, the learned Justice further says in effect that the trustee may lawfully stipulate for freedom from personal liability, and that "the other party is to look solely to the trust estate." Also in this case, which showed a surrender by one trustee to the others, upon their promise, held to be personal, to pay him what the trust estate was indebted to him, the retiring trustee "had the right (which he waived) to keep possession of the trust estate until he was paid." Therefore, here is indicated the trustee's right of indemnity. Therefore, also, a trustee is not held to a mere expenditure of income from a trust estate, with no power to contract indebtedness in advance of the accrual and collection of that income, unless, at least, the creating instrument specifically forbids him to anticipate income. In English cases, that, to which Justice Woods thus

¹Taylor v. Davis (1884), 110 U. S. 330, 334, 28 L. Ed. 163.

merely alludes, is discovered to be the only basis of a trust estate's liability to third persons. Thus in a case decided in 1880 by Jessel M. R.,² where an executor was directed to employ a specific portion of the estate of his testator in carrying on his trade, summonses were sued out by several creditors for goods supplied to the executor in carrying on this trade, to establish their claims against the trust estate. These summonses were dismissed, with leave to the creditors to present intervening petitions. The Master of Rolls said: "I understand the doctrine to be, that where a trustee is authorized by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say 'I had the personal liability of the man I trusted and I also have the right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.' The first right is his general right by contract, because he trusted the trustee or executor; he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the court says to him: 'You shall not set up a trustee who may be a man of straw and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade. The court puts the creditor, so to speak, as I understand it, in the place of the trustee. But, if the trustee has wronged the estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts, has put them into his own pocket, then it appears to me there is no such equity, because the *cestuis que trust* are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get

²In re Johnson, 15 Ch. D. 548.

nothing, because nothing is due to the trustee." Whether the right of a creditor is so intensely derivative as this indicates greatly may be doubted, because, though it be held that the right against the trust estate is through the right of indemnity, nevertheless confidence has been reposed by the testator or settlor, and not entirely by the creditor who extends credit, upon the presumption of the trustee's fidelity, the testator or settlor inviting reliance thereon. Furthermore, it might appear that at the time the trustee contracted the debt for the benefit of the trust estate he had an equity and, if he afterwards converts its money, the relation back of his wrongful act ought rather to fall upon the trust estate than upon the creditor, as the trust estate and not the creditor continues to rely upon the trustee.

§ 40. *Trustees' Right of Indemnity—Continued.*—In one of the cases, decided by Lord Eldon,³ to which Jessel, M. R., refers, it is said, in distinguishing between creditors prior and those subsequent to testator's death: "As to creditors subsequent to the death of the testator, in the first place they may determine whether they will be creditors. Next, it is admitted, they have the whole fund that is embarked in the trade and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate embarked in the trade. They have not a lien upon anything else; nor have creditors in other cases a lien upon anything else; nor have creditors in other cases a lien upon the effects of the person with whom they deal; though, through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien." This language about joint and separate estates and joint and separate debts was occasioned by a contest between the creditors respectively before and after testator's death. As to the latter, however, it is clearly indicated that they have a debt against the trustee and "something very like a lien" against the trust estate. Of course, no lien could exist against the trust estate, except there be a debt against the trustee. In a later case decided by

³Ex parte Garland (1804), 10 Vesey 110.

Lord Justice Turner, Lord Justice Knight Bruce concurring,⁴ *Ex parte Garland*, *supra*, and other cases therein cited were approved, the opinion saying: "They proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort." Jessel, M. R., was merely contending, that, if the trustee had no right of indemnity because of his wrongful acts, the creditors would be cut out, though there might remain a fund employed in the trade, and that these cases did not foreclose that contention. However, *Ex parte Garland* says the creditors have "something very like a lien" on the assets embarked in the trade, which seems to mean a lien on the whole of such assets, resting on a valid indebtedness against the trustee. In other words, the indebtedness is that of the trustee; its security something in the nature of a lien on the entire trust estate.

§ 41. *Trustee's Right of Indemnity, Where the Indebtedness is in Tort.*—In a much more recent English case,⁵ where petitioner had obtained a personal judgment against a trustee for negligence, Byrne, J. said: "It has been argued that there is no authority to justify me in holding that, where damages have been recovered against a trustee in respect of a tort, the person so recovering can avail himself of the trustee's right of indemnity, and so go directly against the trust estate; but the authority of *Bennett v. Wyndham*, 4 De Gex, F. & J. 259, goes to show that, if a trustee in the course of the ordinary management of his testator's estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably, is entitled to be indemnified out of his testator's estate. When once a trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered

⁴*Ex parte Edmunds* (1862), 4 De Gex. F. & J. 488.

⁵*In re Raybould* (1900), 1 Ch. 199, 82 L. T. N. S. 46.

judgment against the trustee should not have the benefit of this indemnity and go directly against the trust estate or assets, as the case may be, just as an ordinary creditor of a business carried on by a trustee or executor has been allowed to do." Further along, the Judge finding that he was "not prepared" to say the injury was "occasioned" by reckless or improper working of the colliery (the trust estate), the petitioner was held entitled "to be indemnified" out of the trust assets. This case is better understood than the statement by Jessel, M. R., *supra*, in regard to the trustee pocketing assets. The holding is something like discussion in regard to *ultra vires* acts committed by a corporation, though apparently the right to recover is more confined than by that doctrine. At all events, however, these cases abundantly show, as said by Justice Woods, *supra*, that unless the trustee is bound no one is bound, and it is only through his being bound, that a trust estate may be resorted to. American cases may or not be less strictly predicated on the indemnity idea, and of this we shall presently see. .

§ 42. *Liability of Trust Estate Through Indemnity, as Shown by American Cases.*—In the English cases above referred to there is discussed the principle of liability, without reference to any express provisions in instruments creating a trust estate for embarkation in trade expressly declaring the liability of the trusts for the acts and contracts of trustees, and this course we shall pursue. Afterwards these instruments appearing both in English and American decision will be considered. In one of the Massachusetts cases,⁶ a suit in Equity was brought against trustees under a will to reach and have a trust estate applied in payment of their debts. By the will testator devised his mills and manufacturing business to three trustees with that business to be continued until a younger son should attain his majority, when the trust estate was to be conveyed to his two sons. The trustees were empowered to provide for outstanding and current liabilities, and incur such liabilities on account of the trust estate as a wise and prudent management might require. Provision was made for their compensation, and that they should not be

⁶Mason v. Pomeroy (1890), 151 Mass. 164, 24 N. E. 202.

liable for any loss to the trust estate not involving bad faith on their part and at the termination of the trust and before its transfer or conveyance they were to be indemnified against any then existing personal liability incurred in the proper execution of the trust. The elder of testator's sons was one of the trustees and, disagreements arising in the management of the business, the trustees other than the son retired. There were two classes of creditors, or at least the retiring trustees claimed, that those becoming creditors before they retired should be preferred to subsequent creditors, even contending that the latter had no claim against the trust estate at all. In other words, the claim was advanced that, as the single trustee managing the estate after the retirement of the other two had no right of indemnity, because of his wrongful acts, these later creditors had no right of recovery out of the assets of the trust. The court states the general principle as follows: "Where trustees, who are authorized to carry on a business contract debts, they are not only liable personally for the payment of them, but the creditors may also resort to the trust fund, subject, however, to the rules of equity, as applicable to the facts and circumstances which may exist in any particular case."⁷

Inasmuch as this question was raised on demurrer and it could not be said that creditors should be thus classified, unless the evidence should show the remaining trustee had no equity, a demurrer to the bill should have been overruled. However, as testimony was taken by a master, it was said there was no finding that the remaining trustee was guilty of any fault involving bad faith on his part. The court was careful, however, to say that it does not decide: "Whether, as a general rule of Equity, the rights of the plaintiffs would be qualified thereby in case

⁷Cases cited: *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 79; *Owen v. Delamere*, L. R. 15 Eq. 134; *Cutbush v. Cutbush*, 1 Beav. 184; *Thompson v. Andrews*, 1 Myl. & K. 116; *Burwell v. Mandeville*, 2 How. 560; *Smith v. Ayer*, 101 U. S. 320, 330; *Jones v. Walker*, 103 U. S. 444; *Pitkin v. Pitkin*, 7 Conn. 307; *Lewin on Trusts* (7th Ed.) 217.

it should be found that he (the remaining trustee) was himself subject to such equity."

§43. *Liability of Trust Estate Through Indemnity, as Shown by American Cases—Continued.*—In a North Dakota case,⁸ the question whether the trustee's right to indemnity was the indispensable basis of a claim by a creditor against a trust estate was not directly involved. The court, in arguing, said, however: "The trustee may claim reimbursement from the funds in his hands for any proper expenditure made by him in the execution of the trust; and this equity is the foundation of the right of the creditor, under peculiar circumstances, to proceed directly against the property itself." To this are cited several cases, English and American, and among the latter, *Mason v. Pomeroy*, *supra*, in which case, as we have seen, this principle was not decided, but the court appeared to doubt its correctness, if thereby was meant that this equity is the sole foundation of the creditor's right. By another one of the cases cited,⁹ this principle does appear to receive considerable, if not absolute, support. Thus the facts show, that a husband and wife conveyed her separate property to a trustee upon trust for her use during life and a remainder in fee for the use of her children living at the time of her death. The trustee was to permit the husband "as agent for said trustee, and as agent and trustee for said (wife) and as agent and trustee for her children after her death, to superintend, possess, manage and control said property for the benefit of all concerned." The concluding clause in the deed is: "My intention is that said (husband) shall be regarded for the purposes of this deed, not merely as an agent, but also a co-trustee," with the other trustee to be in no manner responsible for his acts and conduct. Both husband and wife having died, plaintiffs sued in equity for a balance claimed by them to be due by the surviving trustee, contending that this was a charge in equity upon the trust estate. The court said that the trustee other than the husband was "a trustee

⁸*Wells-Stone Mercantile Co. v. Grover* (1898), 7 N. D. 460, 75 N. W. 914.

⁹*Hewitt v. Phelps* (1881), 105 U. S. 393.

merely of the title without any active duties in regard to the estate," and, therefore, there was "no equitable charge against the estate through the supposed liability" of him. It was also said it is "quite plain that he was never personally answerable for the obligations created by" the husband, "and his alleged assumption of the account may be rejected as incompetent to create any such liability on his part." It was said also his admission could create no charge against the estate. The only way, if any, for the creditors to reach the estate was through their claim against the husband as co-trustee. Upon this the court said: "Does his insolvency create an equity to reach the estate, for the benefit of which the advances are admitted to have been made?" This being an appeal from a Circuit Court sitting in Mississippi, the court first expresses its concurrence of view with Mississippi cases hereinbelow referred to. Then it says, in speaking of the right of the creditor, by way of exception, to resort to the trust estate: "The ground and reason of this rule are, that the trustee has an equity of his own, for reimbursement for all the necessary expenses to which he has been put in the administration of his trust, which he can enforce by means of the legal title to the trust estate vested in him; and that his creditor, in case of his insolvency or absence from the jurisdiction, may resort to the equity of the trustee, upon a principle of equitable substitution or attachment for his own security." Then the court, premising that this principle might not apply at all to indebtedness created by the husband, because the legal title was not vested in him, yet says that even, if it might be extended to this case, it ought to appear, but does not, what was the condition of the account at the husband's death. "For aught that appears, he may have had in his hands means enough belonging to the estate to satisfy all demands against it." Therefore it was held that the estate could not be reached. This case is very strong support for what was said by Jessel, M. R.,¹⁰ about a creditor's equity being defeated by a trustee pocketing funds of the trust instead of paying its debts. The suggestion above as to distinguishing to ascertain whether at the time credit was extended the trustee had an

¹⁰In *re Johnson* (1880), 15 Ch. D. 548.

equity or if he deprived himself of it afterwards, is not referred to. If, however, the creditor once acquired a right against the trust estate, subsequent acts by the trustee ought not to defeat it.

§ 44. *Liability of Trust Estate Through Indemnity as Shown by Other American Cases.*—One of the Mississippi cases¹¹ expressly approved in *Hewitt v. Phelps*, *supra*, shows a suit in reference to the same trust estate, but it was made liable, the reason therefor being found in the following language from the opinion: "Generally the trustee alone must be looked to. He stands between the creditor and the estate. He represents the estate and deals for it. He is entitled to be reimbursed out of the trust estate for all disbursements rightfully made by him on account of it, and creditors must get payment from him; but when they cannot do that, and it is right for the trust estate to pay the demand, and it owes the trustee, or would owe him, if he had paid or should pay the demand, the rule founded in policy, which denies the creditor access to the trust estate, yields to the higher considerations of justice and equity; and in order that justice may be done, the creditor may be substituted, as to the trust estate, to the exact position, which the trustee would occupy, if he had paid or should pay the demand, and seek to obtain reimbursement out of the estate. Applying these principles to the facts of this case, it will be found that they bring it within the exception stated." The other Mississippi case referred to¹² was a suit to reach an estate through a contract for legal services rendered upon employment by an administrator. *Norton v. Phelps*, *supra*, declared that it stated a well-settled principle. There it was declared that: "If the creditor can show that the consideration of his demand inured to the benefit of the estate and is unpaid; that the administrator is non-resident or insolvent; has never received credit for it in his settlements, and that the estate is indebted to him, in such case the creditor may, by bill in chancery, have himself subrogated to the rights of the administrator against the estate, and

¹¹*Norton v. Phelps* (1881), 54 Miss. 467.

¹²*Clopton v. Gholson* (1876), 53 Miss. 466.

to that extent have satisfaction of his demand out of its assets." Here it is suggested, that there reasonably might be a distinction between an administrator, purely an officer by statute, being indebted to an estate and the right of subrogation being valueless, and the trustee of a trust embarked in trade, and subrogation or right of indemnity being equally confined, a *cestui que trust* might be so affected with notice of a trustee's misconduct as to be estopped against claiming the trust estate should not be liable, whether he has any valuable right to indemnity or not. In other words, if his misconduct has by anticipation cut him out of indemnity, *cestui que trust* ought in equity to be considered under duty to have him removed, or the presumption exist, that creditors do have what Lord Eldon says is "something very like a lien upon the estate."¹³ Also, if at the time of the extension of credit the trustee had a right to indemnity, to which the creditor might be subrogated, his subsequent misconduct should not defeat subrogation. It is certain that by the continuance of a decedent's interest in a partnership, a will creating a trust in the business, a trust estate may be made liable for all the present and future debts of the partnership.¹⁴

In the cases just cited the controversy was whether the general estate of the testator or only that part embarked in business was liable for such debts. The holding was that the latter was the case. But in such a case the misconduct of the surviving partner acting as trustee could scarcely be interposed, even though he was indebted to the business. In other words, the only difference resulting from death of one of the partners was that the joint and several liability of partners was destroyed, the live partner still remaining personally liable. In other respects the partnership would remain as it formerly was.

§ 45. *Summary.*—These cases very strongly enforce the idea

¹³Ex parte Garland (1804), 10 Vesey, 110.

¹⁴Burwell v. Mandeville (1844), 43 U. S. (2 How.) 560; Smith v. Ayer (1879), 101 U. S. 320; Jones v. Walker (1880), 103 U. S. 444; Ex parte Richardson (1818), 3 Madd. 79; Thompson v. Andrews (1832), 1 Myl. & K. 116; Pitkin v. Pitkin (1829), 7 Conn. 307.

that a trust estate is not known to the creditor at all, or, if known, it is only looked to by way of security. The trustee is the debtor and unless his act or contract entitles him to reimbursement upon any claim therefor made against him, that security vanishes, though the trustee's individual liability may continue.

CHAPTER VII.

LIABILITY OF TRUST ESTATE.

Directions Creating Primary Liability.

§ 46. *Liability of Trust Estate Where Creating Instrument so Provides.*—The deduction made in the preceding chapter, as to a continuance of a testator's interest in a partnership being carried on at the time of his death and its liability for all its debts, presents occasion for easy transition to considering the status of a trust estate, where the instrument of creation prescribes its liability for the acts and contracts of its trustee. In an early Pennsylvania case,¹⁵ there was a deed of settlement and it declared that: "The property and funds hereby granted shall be subject to all legal charges and expenses in carrying on the business, and all debts heretofore contracted by Thomas in carrying on the business shall be paid out of the property hereby conveyed." The court said: "The authority given the trustee is very ample; so general and comprehensive, that when applied to, and explained by the usual mode of doing business of the kind entrusted to him in this community, it must be considered as sufficient power to contract debts. * * * * Now when it is considered that a great portion of the goods and effects was what was commonly called a store which required to be renewed from time to time, we cannot doubt but it was the intention of the grantor to give the power of contracting debts upon the credit of the fund or property. It would be monstrous to hold that the trustee, altogether without property, as appears from the deed of trust, should be allowed to carry on business on the strength of the trust property, and then to permit him or anyone else to allege that the trust property was not liable, because he was not expressly author-

¹⁵Matthews v. Stephenson (1847), 6 Pa. St. (Barr) 496.

ized to contract debts, in so many words." This was an action at law against the guardian of the children *cestuis que trust* and the question was, whether there could be a recovery to be levied out of the trust estate. The lower court's holding that there could not be, was reversed. In *Mason v. Pomeroy*,¹⁶ considered in the next preceding chapter, the will provided specifically for the incurring of liabilities on account of the trust estate and that the trustees should not be liable for any loss to the trust estate. These provisions and the fact that they related to a trust embarked in trade most probably accounts for the caution expressed by the Massachusetts Court in refusing to say whether a creditor's right to go upon the trust estate depended upon the trustee's right to indemnity. As the court found, as a fact, that the trustee was not in default, it was unnecessary to decide this point. In a recent Pennsylvania case,¹⁷ an action based on negligence was brought against A and B "trustees, trading as John Lucas & Company". The evidence showed a deed of trust and the court said that: "Under its provisions the trustees were empowered to deal with the property as if they were the absolute owners thereof. It is also provided that no responsibility whatever shall result to them by reason of misconduct of agents or employees, also for negligence there shall be no liability or responsibility upon the part of the trustees. It was clearly intended that the risk of any loss in this respect should be assumed and borne by the trust estate." Nothing further is said in the opinion and it appears that the trustees were not claimed against in their individual capacity at all. The principle of liability of the trust estate is very positively stated, but why or how the plaintiff could proceed directly against it in an action at law is not shown, nor is any authority cited. In a North Carolina case,¹⁸ a trustee was sued in his official capacity in an action for damages, and the trust estate held liable. The court explained that this procedure could be adopted in a court having full

¹⁶(1890), 151 Mass. 164, 24 N. E. 202.

¹⁷*Prinz v. Lucas* (1905), 210 Pa. 620, 60 Atl. 309.

¹⁸*Wright v. Caney River Ry. Co. and Morrow Trustee* (1909), 151 N. C. 529, 66 S. E. 588, 19 Am. & Eng. Anno. Cas. 384.

jurisdiction of legal and equitable issues and where a part of the trust fund is in the control and custody of the court and available in satisfaction of the claim. It matters little whether that is a valid reason or not for the point at present involved. The trust estate was held liable, specially because the management of the trust estate was under the supervision and control of the beneficiaries. In the Pennsylvania case last above cited the trustees were held rightly proceeded against in their official capacity because the trust estate was under their absolute control and "it was clearly intended that the risk of any loss" was to be "borne by the trust estate." But it was said in the Wright case: "It is true, as a general rule, that a trust fund cannot be subjected to legal liability by reason of the torts of the trustee or his agents and employees, but this doctrine ordinarily exists in the case of passive trusts, or when active, in those instances where the power and duties of the trustee are so defined and restricted by the law or the provisions of the instrument under which he acts, that the principle of imputed responsibility similar to that which obtains in the case of principal and agent cannot prevail." There is more or less of unsatisfactory statement in this quotation, but it at least announces clearly, that in an active trust there is liability for the acts of the trustee unless restrictions by law or the creating instrument this is not so. This rule takes no account of a creditor's remedy through a trustee's right to indemnity, but through imputability, as in the relation of principal and agent, that is to say imputability so far as the trust estate is concerned. But imputability so far as *cestui que trust* is concerned is another question.

§ 47. *Liability of Trust Estate Where Creating Instrument so Provides—Continued.*—In a Massachusetts case,¹⁹ an agreement provided for non-liability of shareholders in an unincorporated association to third parties for the acts and contracts of trustees, that all contracts by them should specifically provide against any personal liability on their part and that only the property of the trust estate should be answerable.

¹⁹Hussey v. Arnold (1904), 185 Mass. 202, 70 N. E. 87.

The agreement did not specifically say that only the property of the trust estate was to be answerable, but it was said by the opinion, that the trustees could provide against such liability "in accordance with the direction of the agreement." This case and the one it cites will be referred to hereafter in reference to the general right of a trustee to limit his personal liability, and the effect of such a limitation as giving the right to proceed directly against the trust estate. In a Federal Court case²⁰ by Putnam, C. J., affirmed by Circuit Court of Appeals, an agreement creating a trust, the shareholders in a joint-stock association being the *cestuis que trust*, did provide that any money borrowed by the trustees for taxes and the necessary expenses of the trust "shall be and remain, until paid, a lien upon all funds and moneys belonging to this trust or thereafter in the hands of the trustees, in preference to any claim of any shareholders as such upon such funds and moneys." It also provided against shareholders being bound personally; for the trustees in all contracts making reference to the declaration and that all persons and firms or corporations contracting with the trustees shall "look only to the funds and property of the trust for payment." This case was a suit upon a note given by the surviving trustee saying that "the trustee of the Topeka Land and Development Company, as such trustee under declaration of trust dated May 23rd, 1887, and not otherwise, promise to pay" etc. The court said: "It was the duty of the plaintiff to ascertain for itself what powers the trustees had in the premises. * * * Whether or not the plaintiff examined the articles of association, or knew their contents, is of no consequence, because this express provision (in the note) required it to do so, or take the hazard of not doing it." The court then goes on to inquire whether a provision limiting the creditor's remedy to the general assets of the trust is contrary to the rules of law and holds it is not, because "the entire property of the association was held in trust," a court of chancery being bound to "apply it equitably and proportionally to the discharge of obligations incurred by the trustee." In other words a

²⁰Bank of Topeka v. Eaton (1900), 100 Fed. 8; s. c. 107 Fed. 1003, 47 C. C. A. 140.

trust estate, unlike a legal estate, is subject to no dissipation at the expense of general creditors by way of preferences to particular creditors, and, if the only interest of a *cestui que trust* therein is represented by a share of stock, no homestead or exemption laws may interfere with equitable distribution among creditors.

§ 48. *Embarking Trust in Trade as Pledging it for Debt.*—There are cases which seem to proceed on the theory that embarking a trust in trade amounts to a specific statement that it is primarily liable for the contracts and acts of its trustee. Thus in a Pennsylvania case,²¹ the facts show that testator devised all his property to his brother in trust to possess, hold and manage it as a business for the benefit of certain *cestuis que trust*. The trust estate, as well as the trustee, became insolvent. The character and nature of the different kinds of business carried on by testator required large credits. The court said: "These credits were obtained by the trustee in conducting the same, and the creditors upon the faith of the trust estate gave them. * * * While the wife and the others are named in the will as *cestuis que trust*, there came into existence, by reason of the power of the trustee, the estate embarked in trade, the credit given the trust estate in the business, a class of persons whom equity, in case of insolvency, will protect by the preservation of the trust property from destruction or dissipation. This equity has its foundation in the estate which is embarked in trade and to which credit has been given. Trust property which has been embarked in business is primarily liable to creditors for debt, and will be applied as far as it will go to the liabilities. (Hill on Trustees, 4th Ed. * 443.)" Further along, as to this estate, the court said: "As it is insolvent, and the trustee, as the master finds, is also insolvent, he became a trustee for creditors. As such he was bound to protect all their rights and preserve the trust estate for distribution among them according to their respective rights, and he had no right to give a preference to any of them." There-

²¹Woddrop v. Weed (1893), 154 Pa. St. 307, 26 Atl. 375, 35 Am. St. Rep. 832.

fore, the court in this case held that the creditor's claim for an account with the trust property to be divided ratably among all the creditors was sustainable, and certain promissory notes, with warrants of attorney to confess judgment, acquired no priority. This decision elevates the general credit of a trust estate over that of a corporation or individual, with its or his right to prefer one creditor over another. Here, too, we discover that the trustee's own misconduct or the existence or non-existence in him of a right to indemnity, was not suggested, but where the estate is embarked in trade it "is primarily liable to creditors," and creditors become preferred *cestuis que trust*. The opinion also quotes from Lord Eldon that the creditors "have something very like a lien upon the estate embarked in trade."²²

In a Texas case,²³ the contention of non-liability of a trustee, in his personal capacity, appears to have been based mainly upon the fact, that the trust was embarked in trade. The court said: "Although the plaintiffs knew that the defendant was conducting the mercantile business of which he had control and management as trustee for the benefit of the persons mentioned in the conveyance and charged the goods when sold to (the trust estate) the defendant was nevertheless personally liable to the plaintiffs for the price of the goods." The court also adopted the text from Hill on Trustees, *533, that so far as this personal liability is concerned: "It is immaterial that the trade is carried on by him in consequence of express direction in the trust instrument; although the trust property will doubtless be primarily liable to the creditors and, will be first applied so far as it will go in discharge of the liabilities." This theory of primary liability seems, however, not to operate in the way of postponing right of recovery against the trustee in the first instance, because, possibly, as he has control of the trust estate he should be able to take from its funds to discharge his per-

²²Ex parte Garland (1804), 10 Vesey, 110.

²³Connally v. Lyons (1891), 82 Tex. 664, 18 S. W. 799, 21 Am. St. Rep. 935.

sonal obligation incurred for the benefit of the trust and this is all that a court could do for him.

§ 49. *Special Contract Relieving Trustee From Personal Liability.*—The right of a trustee to relieve himself from personal liability in his contracts as such has been ruled to be an independent right. In other words, if he stipulates clearly and unambiguously for his release from personal liability when acting in a representative capacity, it has been ruled, that his stipulation is valid, whether or not the trust estate is bound by the contract. Thus in a Massachusetts case,²⁴ an action at law was brought against the makers individually upon a note, on the face of which it was stated that “we as trustees but not individually promise”, etc. The note was signed by the makers with the words “Trustees” following thereafter. It did not appear from the note for whom or for what they were trustees and it was contended that the word “trustees” was “a mere description of the general relation or office which the persons signing the paper hold to another person or to a corporation.” This contention was held not sustained, because, said the court, this “would require us to strike out the words ‘but not individually’, although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.” Then as showing the absolute right of the trustees to stipulate, the court further said: “It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court to alter the contract for the purpose of giving it validity.” The court also announced the general principle that: “If a party in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so at law.” This case was later approved by the same

²⁴Shoe & Leather Nat'l. Bank v. Dix (1877), 123 Mass. 148. See also Glenn v. Allison (1882), 58 Md. 527.

court²⁵ in a case where the agreement creating the trust directed that trustees should in all contracts stipulate that they were not to be personally liable. In another case,²⁶ the reason for the validity of such a stipulation is based upon the fact that thereby the creditor could apply directly to a Court of Equity "as contemplated by the express direction of the articles of association that the debtors of the trust should look for payment solely to its property." This last case, perhaps, may be said still to leave the question open as to whether such way would be open in the absence of such contemplation in an instrument creating the trust. On this subject the next following case from New York²⁷ is pertinent. In this case there was no trust embarked in trade, but real estate had been conveyed to the trustee upon trust to receive the rents and pay over the net income to the life tenant with remainder over. The trustee having no funds in hand and repairs being needed, they were made upon the credit of the estate. The court said: "The general rule undoubtedly is, that a trustee cannot charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable and the remedy is against him personally. But there are exceptions to this general rule. When a trustee is authorized to make an expenditure, and he has no trust funds and the expenditure is necessary for the protection, reparation or safety, of the trust estate, and he is not willing to make himself personally liable, he may, by express agreement, make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party, who may upon the faith of the trust estate, make the expenditure." This ruling was based on an older case,²⁸ which held that for the necessary protection of the trust estate "there is no rule of law or equity which would prevent the trustee as-

²⁵Hussey v. Arnold (1904), 185 Mass. 202, 70 N. E. 87.

²⁶Bank of Topeka v. Eaton (1900), 100 Fed. 8.

²⁷New v. Nicoll (1878), 73 N. Y. 127, 29 Am. Rep. 111.

²⁸Noyes v. Blakeman (1852), 6 N. Y. 567.

signing his own lien." "Shall", the court said, "the trustee stand by quietly and see the objects of the trust utterly frustrated? Rather than suffer it, the law will infuse into the trust deed a provision to enable the trustee to exercise the necessary power, if possible, to prevent it." In other words, even as to trusts not embarked in trade, or where the creating instrument does not specifically state, the trust estate may not be directly liable for debts created in its management, yet they may be made so by the law "infusing" into that instrument the necessary power for them to become thus liable. These two cases, it is perceived, plainly recognize that a trust estate can be charged by the trustee when "by the terms of the instrument creating the trust" this is provided, and they rule that, even when it does not so provide, if an expenditure is necessary for the preservation of the trust estate, a trustee, unable or unwilling to become personally liable or to advance the necessary funds, may transfer his lien to another. Generally, too, it may be said that in the absence of a reservation against personal liability, the trustee becomes personally liable, even if the trust deed provides he shall be free from personal liability. Thus as said by Holmes, J., in speaking as to a particular case:²⁹ "It was also true, of course, that the fact that the trust deed provided that the defendants (trustees) should be free from personal liability, i. e., under the deed, did not limit their authority to contract personally with the plaintiff, if they saw fit." In an Illinois case,³⁰ it was sought to proceed directly against a trust estate, where a former trustee had engaged the services of plaintiff, a broker, to obtain a loan. Before negotiations could be concluded the trustee died and his successor obtained the loan from another. It was held that the trustee was personally liable and this liability survived his death. However, the broker's compensation, it was said, could have been made by the trustee a specific lien on the trust fund had the contract between the broker and the trustee so specified, as the services were beneficial to the estate.

²⁹American Mining & Smelting Co. v. Converse (1900), 175 Mass. 449, 56 N. E. 594.

³⁰Johnson v. Leman (1890), 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 63.

In a Rhode Island case,³¹ trustees sought to escape personal liability on a note endorsed by them as trustees. They claimed that the trust being one embarked in business and the note being indorsed by direction of the will and this being known to the holder, this constituted a mere pledging of the trust estate. The court, however, held that a trustee is held personally liable upon his contracts as trustee because he has no principal, or, rather, he is the principal himself. "Therefore it was not thought that the fact that the defendant trustees were empowered by the will, and it was made their duty to indorse the notes in suit, is sufficient to relieve them from liability upon their indorsements, they not having stipulated that they were not to be so liable."³²

§ 50. *Summary.*—The array of authority and excerpts therefrom shown in this and the next preceding chapter abundantly sustain the proposition that a trust estate may be made liable, where a debt has been incurred for its benefit. However, it also appears that the trustee is liable in the first instance, where he does not otherwise stipulate. Liability, however, would seem always to depend upon the debt being one contracted by the trustee by virtue of his powers as such, or upon an act reasonably in the administration of the estate confided to his management.

³¹Roger Williams et al. Bk. v. Groton Mfg. Co. (1889), 16 R. I. 504, 17 Atl. 170.

³²See also Mitchell & Co. v. Whitlock (1897), 121 N. C. 166, 28 S. E. 292.

CHAPTER VIII.

CESTUIS QUE TRUST OF A TRADING TRUST.

English Decisions.

§ 51. *Unincorporated Associations*.—The fact, that various business enterprises have been attempted to be carried on by joint-stock and other unincorporated associations leads to an inquiry into the relations of members *inter sese* and to the contracts and acts of the business carried on by such associations. In England these associations came into disfavor to such an extent that what is known as “The Bubble Act” was enacted in the early part of the Eighteenth Century for their suppression. It was, however, the form, which the agreements or articles for these associations took, more than the fact of their formation, which called down upon them the law’s denouncement. Afterwards, legislation in regard to partnerships, called “Companies Acts” prescribed certain regulations where members in a partnership exceeded a designated number. The form, to which allusion is above made, was the providing for membership in and by the ownership of transferable shares. It was by the issuance of such shares, that wild schemes were exploited, along with representation, that there was no personal liability attaching to their ownership. Furthermore, actions either at law or in equity were difficult to bring or be brought, by reason of an infinite number of necessary parties thereto.

§ 52. *English Decisions as to Associations With Transferable Shares*.—The purport and bearing of the “Bubble Act” was treated nearly a hundred years after its passage, and, in considering whether or not an association with transferable shares was condemned, Lord Ellenborough, C. J., said:¹ “Independent of the general tendency of schemes of the nature of the project

¹King v. Dodd (1808), 9 East 516.

now before us to occasion prejudice to the public, there is besides in this prospectus a prominent feature of mischief; for it therein appears to be held out that no person is to be accountable beyond the amount of the share for which he shall subscribe, the conditions of which are to be included in a deed of trust to be enrolled. But this is a mischievous delusion calculated to ensnare the unwary public. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility; but as to the rest of the world it is clear, that each partner is liable to the whole amount of the debts contracted by the partnership." It is seen, that the opinion was not that the issuance of transferable shares was illegal or objectionable, but the representation that there was no relation of partnership, with liability attaching thereto, which gave to the project a fraudulent aspect. Three years later the Lord Chief Justice considered more fully the effect of the "Bubble Act" upon associations with transferable shares.² There was a prosecution under indictment against one Webb and others for the formation of such an association. The Lord Chief Justice in rendering judgment for defendants, said among other things: "The enacting part in Section 19 relates to all such unlawful undertakings and attempts *so* tending to the common grievance, etc., and the making or taking of any subscriptions *for that purpose*, etc. It is only, therefore, where the subscription is with reference to undertakings, etc., which the act prohibits, that it is illegal. The act does not apply indiscriminately to all subscriptions. The purpose for which this capital was raised, viz: The buying of corn, etc., not manifestly tending to the common grievance, and being in this case expressly *found* to have been *beneficial*, the only remaining question is this, whether, as the shares in this institution are, to the extent which has been pointed out, transferable, the defendants have offended against this act in respect of having raised such a description of transferable stock. It may admit of doubt, whether the mere raising transferable stock is in any case, *per se*, an offense against the act, unless it has relation to some undertaking or project which has a tendency to the common grievance, prejudice or

²King v. Webb (1811), 14 East 506.

inconvenience of his Majesty's subjects or of great numbers of them." Then his Lordship holds that at least shares of limited transferability such as were provided for by this company did not come under the act.

§ 53. *English Decisions as to Associations With Transferable Shares—Continued.*—Lord Eldon thought, or appeared to think, that joint-stock associations were illegal at common law, because they could not "effectually demand what they had a right to demand or be effectually sued for that for which they were liable," all of this because of the partners being so numerous courts practically could not attend to all the necessary parties in a suit.³ But Lord Brougham in 1832 expressly denied this proposition,⁴ saying: "To hold such a company illegal would be to say that every stock company not incorporated by charter or act of parliament is unlawful, and, indeed, indictable as a nuisance, and to decide this for the first time, no authority of a decided case being produced for such a doctrine. The clause intimating that each subscriber is only to be liable to the extent of his share is not enough to make the association illegal; such a regulation is wholly nugatory, indeed, and can serve no purpose whatever, unless to give notice. * * * * For the purpose of restricting the liability of the shareholders, it would plainly be of no avail; and whoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility, which that holds out, would have himself to blame and be the victim of his ignorance of the known law of the land." This case was followed in 1843 by a decision by Tindal, Lord Chief Justice,⁵ in which he said: "The raising and transferring of stock in a company cannot be held, in itself, an offense at common law; such species of property was altogether unknown to the law in ancient times; nor indeed was it in usage and practice until a short period antecedent to the passing of the Statute ("Bubble Act"), as is evident from the preamble to the 18th section which recites that it is notorious that these projects and

³Van Sandan v. Moore (1826), 1 Russ. Ch. 441.

⁴Walburn v. Ingilby (1832), 1 Mylne & K. 61, 76.

⁵Garrard v. Hardey, 5 Manning & Granger, 251.

undertakings, which it is the object of the clause to put down, had been contrived and practiced within the Kingdom since the 24th of June, 1718, evidently showing that the act was looking to some grievance of late introduction. And as that clause has been repealed, we find no authority for holding that an allegation that the parties raised and transferred stock is simply and *per se*, without any statement of the mode by which it injures and defrauds the public, an indictable offense at common law."

In 1859 Romilly, ⁶M. R., said:⁶ "I have listened in vain for any case, or indeed for the statement of any principle, whereby at common law and independent of any statute, a partnership between persons who agree among themselves that their shares shall be legally assignable, is absolutely void or illegal. I find no case which determines it, and no principle on which it can rest, nor am I able to conjecture why such an association should be void at common law. It does not appear to me to offend against society, or to injure any class of individuals, and, therefore, unless bound by distinct authority, I should not be the first judge to hold that such an association was void at common law."

§ 54. *Summary of Above Cases.*—These cases indicate merely a prejudice against transferable shares of stock in an unincorporated association, as a kind of aftermath of the calamity that succeeded their employment in such schemes as "The Bubble Act" was enacted to suppress. Investment in these shares was the avenue of approach to thousands willing to gamble upon the delusive promises of wealth in extravagant prospectuses scattered broadcast over England. But the extent only to which English decision went in regard to the issuance of such shares seems to be, that they could be regarded as a means to a fraudulent end, but in a beneficial, lawful enterprise they could be lawfully provided for. It is also to be observed, that the liability of shareholders as partners was only considered as to undertakings carried on by an unincorporated joint-stock association

⁶Re Mexican & So. Am. Co., 27 Beav. 474, 4 De G. & J. 320.

as such. There was not yet evolved the idea of such an association forming the nucleus for investment in shares in an enterprise, the title in and control over the property of which was to be in trustees. This development appears in English cases next herein to be considered.

§ 55. *Transferable Shares in a Trading Trust.*—To show how pointedly different in England was the old idea in an association, a mere partnership, with interests therein measured by transferable shares, carrying on a business through a board of directors, and a similar association causing title to property embarked in trade to be vested in trustees, who were to manage and control it according to their own discretion, a somewhat extended consideration should be given to a notable case decided in 1880.⁷ The English Companies Act of 1862 provided that any association consisting of more than twenty persons, formed for the purpose of carrying on business, that had for its object the acquisition of gain by the association, or by the individual members thereof, should, to be legal, be registered as a company under said Act. A shareholder in a Submarine Cables' Trust sued to have it wound up as being illegal for want of such registration. Sir George Jessel, M. R., rendered judgment specifically declaring that it was an association of more than twenty persons formed for such a purpose "without being registered as a company under said act," and he "ordered that the affairs of the association should be wound up." This judgment was reversed on appeal, with directions that the action be dismissed, Lords Justices James, Brett and Colton of the Court of Appeals all concurring in separate opinions. The association or trust was constituted by a deed between six persons, called in the opinions trustees of the one part, and a seventh person, called in said opinions the covenantee, "for and on behalf of all the holders for the time being, of the certificates hereinafter mentioned," of the other part. This deed recited that various persons had subscribed in or for the purchase by said trustees of the stock, shares and debentures of certain submarine telegraph companies as set forth in an attached schedule, all

⁷Smith v. Anderson, 15 Ch. Div. 247-285.

of which had been transferred to said trustees on the books of said companies, and it was designed to issue to said subscribers certificates of shares according to their subscriptions respectively. The trustees covenanted to hold said stock, shares and debentures, called scheduled securities, in trust, and from the income pay expenses of the trust, not to exceed a certain sum, to pay interest at six per cent upon the face value of the certificates and for redemption of so many of said certificates as the surplus income would permit. Between periods of distribution of this income, the trustees could make investments in Exchequer Bills or the income deposited in bank at interest. These trustees were also given power to sell any of the scheduled securities upon a minimum premium above what they were purchased for and the proceeds of sale should be treated as surplus income, unless they unanimously resolve and their resolution be confirmed at a meeting of the stockholders that other securities of the same character be purchased and held subject to the same trust as the scheduled securities. Then follow provisions for annual meetings for stockholders, which meetings may receive reports, appoint auditors and elect new trustees to fill vacancies. It was said in a prospectus inviting investment in shares of the trust, that: "A person desirous of holding Submarine Cable shares can thus by a minimum of trouble and expense diminish the risk of investing in any one particular undertaking by spreading his investment over a number of undertakings." The holders of these certificates far exceeded twenty in number. Sir George Jessel, M. R., went into an elaborate consideration of various clauses and summed up his conclusion as follows: "It does appear to me that this is as plain a company or association for the transaction of business for the purpose of gain as could be put fairly into words, if you change names and nothing more. If you call the certificate holders 'shareholders' and call the trustees 'directors' and call the association a 'company', changing those three names, you have about as simple a description of an ordinary company under the Act as I think you can well have. I am satisfied, as far as I am concerned, that this is not only within the words of the Act, but is the very thing which the Act intended to prohibit for various reasons, and that this

is a mere device, and a very transparent one, to endeavor to escape from the plain meaning of the enactment." Evidently, this case must have been argued on the theory that this arrangement was a mere holding trust, but Sir George Jessel's analysis of its provisions was that it was active, with trustees to employ their time in carrying on its affairs and therefor to be compensated. The opinions of the Lords Justices will now be looked to as to whether they regarded the trustees or the *cestuis que trust* as carrying on the business.

§ 56. *Scope of Opinions in Smith v. Anderson on Appeal.*—The point was squarely made on appeal that there was a mere "trust for investment" and not a carrying on of business. The powers given the trustees were called merely incidental to the main object. On colloquy with counsel, Brett, Lord Justice asked: "What is the 'business' here?" And counsel replied: "The Act of original investment, the putting out the money which the certificate holders contribute and the management of the investments." And the Lord Justice said: "But do the certificate holders carry on that business?" Counsel then replied: "Yes, the trustees invest as servants of the association." Further along James L. J. asked: "Can the certificate holders be held liable on contracts? Could anybody but the trustees be made liable for rent, if the trustees did not pay it?" Counsel replied: "We must admit that there would be great difficulty in suing anyone but the trustees." James, L. J., after premising, that the case had been argued very fully and opportunity had for considering it since, expressed his disagreement with the Master of Rolls. He said the Companies Act was aimed at large trading undertakings by large fluctuating bodies, and certainly did not apply to a mere investment company like this. Then he says: "Again, if there is any business at all, it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees. Now the Master of Rolls appears, from his judgment, to have considered that these trustees were, in substance and in law, directors. To my mind, the distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the

property and deals with it as principal, as owner and as master, subject only to an equitable obligation to account to some persons, to whom he stands in the relation of trustee, and who are his *cestuis que trust*. * * * * The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director and for whom he is acting."

§ 57. *Smith v. Anderson—Continued.*—Brett, L. J., after going into an analysis of the Companies Act and concluding this business did not fall under it, then says: "But supposing this was such a business as was mentioned in the Act, were the certificate holders the persons who were to carry it on? It seems to me that certainly they were not. I take it that the persons called trustees in the deed are clearly trustees, as distinguished from agents and from directors. If, indeed, although they were called trustees, the duties which they had to perform were really those of directors; then, although they were called trustees, the legal effect of the deed would be that they would be directors, and if they are directors they are agents; but here it seems to me clear that according to true construction of the deed, they were not directors or agents, but trustees. If that be so, the certificate holders, even if they were associated at all, were not associated for carrying on the business. It was not their business. They could not have been made liable for any contract made by the trustees. It was, of course, urged that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts upon which they are to be liable are their agents authorized to bind them by their contracts which is obviously not true. Therefore, even if there be here a business within the meaning of the section, yet it is not carried on by the certificate holders."

§ 58. *Smith v. Anderson—Continued.*—Colton, L. J., going more particularly into the acts of certificate holders in respect of the management of the trust, said: "In my opinion, what must be shown is that the association by themselves or by their

agents carry on a business. Now here what can be said? That the certificate holders do it by themselves, can, I think, hardly be contended. All the power which the subscribers of this money had was to attend sometimes at meetings. The only business done at them was to receive and consider a report from the trustees on the condition and affairs of the trust, to appoint auditors to audit the accounts and to elect new trustees to fill up vacancies. It is impossible, in my opinion, to say that the certificate holders are by themselves in any way carrying on any business by reason of what is done at these meetings. Then clause 20 says, that a reinvestment must be sanctioned at a meeting of the certificate holders summoned for that purpose. * * * All that is here given to the certificate holders is the power to give such assent as *cestuis que trust* usually give for a change of securities when they are not incapacitated by infancy or otherwise. They meet as *cestuis que trust* to give their assent, not as members of the partnership joining to carry on and control the business of the partnership even if it were a business." He then goes on to show that it is of no concern to those who deal with the trustees that the latter are to account to the *cestuis que trust*, because in dealing with the trustees "they deal with those persons as the only persons contracting and holding themselves out as personally liable."

§ 59. *Summary of the Lords Justices' Opinions.*—The excerpts above made possibly were preceded by more of detail than is strictly necessary, but this was done advisedly to show that the Master of Rolls was met and answered upon an admission, for the sake of argument, that his conclusion that there was a carrying on of business by means of the deed constituting the trust. But the three Lords Justices say the association, or the partnership, if it may be so called, did not carry on the business. Two of the Lords show that the trustees are not agents, and the other intimates that, if their acts were controlled or directed by the certificate holders they would be, and then he reasons that the power residing in the certificate holders amounted to no such control, even if this could be called a business coming under the act. In a word, all rule that the number of certificate holders

could not be counted under the limitation as to twenty or more persons associated to carry on business. In these opinions also, it appears that the status of a *cestui que trust*, as based on ownership of a transferable certificate or share, is completely recognized, and that an owner of a certificate entitled to receive the income of a business carried on by trustees or by managers of a trust embarked in business is, in no sense, connected with their contracts in a personal sense, so far as third persons are concerned.

§ 60. *Construing These Opinions Through Reference to Former Decisions.*—The basic theory upon which an association is a partnership to carry on business was in the mind of James, L. J., that the persons forming it must have mutual rights and obligations, and it is insufficient that “they happen to have a common interest or several interests in something which is to be divided, between them.” And for this he refers to a case decided in 1860,⁸ which is referred to at large in a North Dakota case,⁹ as a case wherein in Exchequer Chambers the six judges were equally divided, and where on appeal the judges were requested to give their opinions. Again six judges were equally divided, while the law lords, Campbell, Brougham, Cranworth, Wensleydale and Chelmsford, were unanimous. The question provoking a great contrariety of reasoning, was whether, where a co-partnership conveyed to trustees their business to be carried on for the benefit of their creditors, where the creditors joined in the execution of the deed, were authorized thereby to make rules for its conduct or to put an end to it altogether. The deed was held by some to create a partnership, and the creditors, therefore, liable for the contracts of the trustees. The reasoning of the judges holding there was a partnership and the creditors liable was upon the theory that the business was under their control and carried on by agents for their profit, while the grantors were debarred from any control at all. The conclusion of non-liability was variously based, and only such

⁸Cox v. Hickman, 8 H. L. C. 268, 9 C. B. (N. S.) 47.

⁹Wells Stone Mercantile Co. v. Grover (1898), 7 N. D. 460, 75 N. W. 914.

reasoning need be quoted or referred to, as involves control by beneficiaries or *cestuis que trust* over trustees making or failing to make them agents and not trustees, though so denominated. Mr. Baron Channell said: "The fact that the creditors had power to put an end to the management by the trustees and to discontinue the business and to require the property, the capital, to be sold and divided amongst them in satisfaction or part satisfaction of moneys made a charge on the property, does not vary the case so as to constitute the creditors partners in the business. They had no power, I think, by virtue of the deed to take upon themselves the management of the business." Chief Baron Pollock, admitting that, if the trustees were merely managers under the direction of the creditors, the latter would be liable for debts created by the former, then says the latter "have no power to interfere and take the management in their own hands," although they may call meetings and direct the discontinuance of the business and the property sold and divided ratably among themselves. Lord Cranworth, speaking of the status of the creditors to the business, said: "The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock and so compelling an abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act, if he considered the terms prescribed by the creditors to be objectionable." While the other Lords did not allude to this special power in the creditors to end the business when they saw fit, their opinions say "the business was to be carried on by the trustees," one saying: "Can we collect from the deed that each of the subscribing creditors is a partner with the trustees and by the mere signature of the deed constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors." Mr. Justice Williams, in taking the view that the creditors were liable, asserted that: "The trustees are placed under the control of the general body of the creditors, who may, at their pleasure, alter, add to, or diminish the powers, trusts and provisions, and may in effect, appoint new trustees." Justice Crompton, on the same side, said: "They (trustees) seem to me, as between them

(third persons) and the creditors to be the mere agents of the creditors. The creditors have the most entire control of the whole concern. They are expressly empowered to give any orders or directions for the present or future management, and they are the only persons to whom the managers can look for funds in the event of the property left in the concern being lost or insufficient." And Justice Blackburn said: "Now it seems to me, that the present defendants have, by the deed to which they are parties, stipulated that the business shall be carried on for their benefit and under their control." Thus the three judges holding to liability on the part of the creditors stress the fact of control being given by the deed to the creditors over the trustees, while the five lords and the other three judges either directly or impliedly deny the existence of such control in and by the deed. It is not unfair to conclude that, had the minority construed this special power in the deed as did the majority, the decision would have been unanimous, that the creditors joining in the deed were not personally liable for debts created by the trustees.

§ 61. *Summary.*—Cox v. Hickman and Smith v. Anderson, *supra*, would place on practically indisputable ground, in English decision, that a trustee vested with the legal title and absolute control of property in a trading concern is not an agent of *cestuis que trust*, nor are they responsible for his acts and contracts. It is further to be specially observed, that these two cases consider two kinds of *cestuis que trust*, those whose interests in profits in a trust embarked in trade depend upon the ownership of transferable certificates or shares of stock and those whose interests are defined otherwise by the deed of trust, namely, the amount of the indebtedness of creditors respectively. This, however, seems wholly unimportant as affecting the status of the trustee with respect to third persons and the non-liability of *cestuis que trust*. Their equitable interest is in the trust estate, and as said in a Massachusetts case:¹⁰ "The *cestui que trust* takes the whole legal title to

¹⁰Broadway National Bank v. Adams (1882), 133 Mass. 170, 43 Am. Rep. 504.

the accrued income at the moment it is paid over to him." This might be even more strongly expressed by saying that he takes the whole legal title to the accrued income at the moment it *should be* paid over to him, because beyond that time there would be a wrongful withholding by the trustee. This clears the way for a consideration of American cases on the line pursued in this chapter.

CHAPTER IX.

CESTUIS QUE TRUST IN A TRADING TRUST—CONTINUED.

American Decisions.

§ 62. *Shareholders as Cestuis Que Trust.*—A joint stock company is an unincorporated association with close resemblance to a corporation. The essential distinction between it and a corporation is that the holders of its stock are partners and, therefore, there is not that separate entity between it and its members as in case of a corporation and the owners of its stock. Business, therefore, carried on by it is the business of a partnership. Whether, however, business is *carried on* by it, when a trustee of a trust estate in trade is vested with full power is a proposition in which we are here concerned, as accessory to the basic inquiry in this treatise, namely whether individuals, without creating a partnership, either as to the world or *inter sese*, may be formed for the purpose of profit and cause a business to be carried on for the associates as *cestuis que trust* with no personal liability on them for the acts and contracts of that business. Incidentally there is here treated joint stock companies to ascertain whether identification of *cestuis que trust* may be made through ownership of shares in such companies. In the first place, it is shown in many ways where there is merely the question of determining interest in the assets of a joint stock association, that a share of stock may represent an interest, if the sum of the certificates represent its capital stock.¹ This principle is illustrated in a Pennsylvania case, where the trial court held that the proceeds of the sale of property, the title to which was vested in a trustee, should be paid over to certificate holders in an unincorporated association, and its reversal by the Supreme Court on the ground that the association was not a joint stock association, though certificates of shares

¹Near v. Donnelly (1890), 80 Mich. 130, 44 N. W. 1118.

were issued by it to some of its members but not to others who also contributed to the purchase of this property. The court said: "The certificates issued to the lenders seemed to have been intended to serve as evidence of the amount of money borrowed, and as an informal pledge of the property bought as security for the money advanced."² Thus it is shown, that it was necessary to get away from the fact that the certificates were representative of shares for a reversal of the decision of the lower court. In these two cases the trusts were merely passive. The fact that such an association's property is distributable among its shareholders in the event of its dissolution makes it seem indisputable that a share is an interest in property.³ This is enforced so strictly, that it has been held that, upon dissolution, trustees cannot without the consent of all the stockholders convert assets into anything but money and distribute them ratably to shareholders, a mere majority being insufficient for this.⁴ A New Hampshire court construed an agreement for the formation of a joint stock association as meaning that nobody but subscribing stockholders should have any interest in the business, and that the partnership among them was dissolved by purchase of all the shares by one to whom the business then belonged.⁵ This is to say the units of interest make in the aggregate the entire interest. In another Pennsylvania case the entire assets of a joint stock association were vested in a trustee, whose authority to act was to be controlled by a vote of its members. An execution against a shareholder was levied on the property, and it was held a wrongful levy because his interest was represented by transferable shares,⁶ and such shareholders are *cestuis que trust*.⁷ Some at least of the above cases show title in a dry or passive trust, but the rule is no different where the trust

²Crawford v. Gross (1891), 140 Pa. 297, 21 Atl. 356.

³Butterfield v. Beardsley (1874), 28 Mich. 412.

⁴Frothingham v. Barney (1876), 6 Hun. (N. Y.) 366.

⁵Farnum v. Patch (1880), 60 N. H. 294, 49 Am. Rep. 313.

⁶Pittsburg Wagon Works' Estate (1903), 204 Pa. 432, 54 Atl. 316.

⁷Clagett v. Kilbourne (1861), 66 U. S. (Black) 346.

is active.⁸ The Federal Supreme Court, in considering the question of the status of a share of stock in a partnership, said through Justice Holmes:⁹ "We may assume in accordance with a favorite speculation in these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts." Then he proceeds to say that a National Bank cannot acquire a share in a partnership because this makes it a member of the partnership with liability attaching thereto.

§ 63. *Other Contributors as Cestuis Que Trust.*—Crawford v. Gross, *supra*, went so far in sustaining the claim that any contributor to the funds of an active business enterprise, in form of a trust estate, was entitled to a proportional interest in its capital or assets, that it construed a paper writing issued by its managers and purporting to be a certificate of a share to be evidence of money loaned and an informal pledge of its property, leaving, in effect, the contributors not holding such certificates, the *cestuis que trust*. In an Iowa case there was an agreement between two parties to form an association for the purpose of buying and selling land in Iowa. It provided that money was to be furnished to their joint agent, who was to make the purchases, title to be taken in the name of a third person as trustee, with the parties to have equitable interests respectively according to his contribution to the fund. The agent was to sell as the authorized agent of the trustee, who was to distribute the proceeds. One of the contributors dying, his widow was held not entitled to claim dower in the

⁸Hart v. Seymour (1893), 147 Ill. 598, 35 N. E. 246; Oliver's Estate (1890), 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894; Phillips v. Blatchford (1884), 137 Mass. 510; Hussey v. Arnold (1904), 185 Mass. 202, 70 N. E. 87; Howe v. Morse (1899), 174 Mass. 491, 55 N. E. 213.

⁹Merchants' Nat'l. Bank v. Wehrmann (1906), 202 U. S. 295, 50 L. Ed. 1036.

land.¹⁰ The court said: "Their (contributors) relation to the enterprise was very much like the relation of stockholders to the property of a corporation."

§ 64. *Creditors as Cestuis Que Trust.*—As we have already seen a debtor's business, which has become embarrassed, may be continued by being run by a trustee for the creditors' benefit. One of the cases we have referred to as illustrating this question is where the contention was made, that these creditors were liable as partners in the business that was being carried on,¹¹ a question to which the next succeeding chapter will be mainly devoted. Another case also hereinbefore referred to was where business of a debtor was conveyed to a trustee to be carried on in interest of his creditors,¹² and there the question considered was whether the trustee was or was not liable for negligence.

§ 65. *Devisees as Cestuis Que Trust.*—The Supreme Court of the United States has by several cases held that a testator might authorize the continuance through trustees of a business in which he was engaged at the time of his death, making the part of his estate embarked therein alone liable to its debts and the income thereof payable to *cestuis que trust*, until the business ceases,¹³ and so has it been held elsewhere.¹⁴

§ 66. *Summary.*—Thus we ascertain that by settlors and testators a trust to carry on business may be created, and, by former chapters that when created the trustee not being an

¹⁰Mallory v. Russell (1887), 71 Iowa 63, 32 N. W. 102.

¹¹Wells-Stone Mercantile Co. v. Grover (1898), 7 N. D. 460, 75 N. W. 914.

¹²Wright v. Caney River Ry. Co. (1909), 151 N. C. 529, 66 S. E. 588, 19 Am. & Eng. Anno. Cas. 384.

¹³Burwell v. Mandeville's Excr. (1844), 2 How. 560, 11 L. Ed. 378; Smith v. Ayer (1879), 101 U. S. 320; Jones v. Walker (1880), 103 U. S. 444.

¹⁴Mason v. Pomeroy (1890), 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771.

agent, like the officer of a corporation, incurs a personal liability for his acts and contracts in the management of that trust. Now it is to be inquired, whether additionally, and under all circumstances, in ordinary contracts, the *cestuis que trust* are personally liable. It appears thus far, that it is immaterial to the formation of a trading trust, or possibly, to speak more specifically, to the embarking of a trust estate in trade, what is the character of a *cestui que trust* or how he becomes such. There must, however, be a legal criterion for his identification. In this aspect the general legality of transferable certificates of shares in a joint stock company is necessary. As we have seen¹⁵ such legality was, for a time at least, disputed in England because of the "Bubble Act", and when it was reasoned out, that even during the nearly one hundred years this act was in force they were not illegal *per se*, but only as connected with some scheme forbidden by that act, the repeal of the act did away with all claim of their illegality. Long after that repeal it was urged in Massachusetts, that the Bubble Act being in force on July 4th, 1776, was still in force in this country. Justice Holmes after saying: "It is too late to contend that partnerships with transferable shares are illegal in this Commonwealth", further said: "We attach little weight to the argument that the Bubble Act (St. 6 Geo. I. c. 18) was made applicable to America in 1741 by the St. of 14 Geo. II c. 37, by which among other things, all offenders against these acts were subjected to the penalties of a *praemunire*, and brokers dealing in the shares therein referred to were made incapable of acting as brokers for the future. * * * The fact that as far back as the records of our judicial decisions extend, this act has not been practiced on in the courts, but has been ignored by them, is strong evidence that the act was not among those that were kept in force after the Revolution."¹⁶ It is ventured as an observation that in every other of our states there is the same experience as in Massachusetts. In New York where a statute exists regulating procedure by or against joint stock associations, this statute was not recognized as

¹⁵Chapter VIII, *supra*.

¹⁶Phillips v. Blatchford (1884), 137 Mass. 510.

creating an original right, but the relations of members were with common law rights and liabilities as before existing.¹⁷ There are only a few of the States having statutes respecting the organization of such associations,¹⁸ and wherein these may purport to create a new right, they, no doubt, would be deemed merely declaratory of the common law. At all events, as we have seen by English decision, transferable shares were never forbidden even by the "Bubble Act" as being illegal *per se*.

Moreover, it might well be said that the arguments against transferable shares in a joint stock association would not necessarily apply to a trust estate in business. The issue of transferable shares in a partnership is in derogation of the partnership principle of *delectus personal*, and a changing body of partners is difficult to identify for purposes of suit; but in a trust estate the *cestuis* have no obligation *inter sese* or to the world at large, and their identity, whether changing or not, is a matter of indifference as far as third parties are concerned. The issue of certificates to them is merely a convenient confirmation of their ordinary rights.

¹⁷People ex rel. Winchester v. Coleman (1892), 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

¹⁸Pennsylvania Act June 2, 1874; Virginia, Act March 2, 1875; Mich. Comp. L. 1897 Ch. 160; New Jersey Gen. Stats. 1896 p. 2240; Ohio Gen. Code 1910, sec. 8059; New York Consol. Laws pp. 1873-1876.

CHAPTER X.

NONLIABILITY OF CESTUIS QUE TRUST OF A TRADING TRUST.

§ 67. *Preliminary.*—In order correctly to view the question whether settlors or contributors or shareholders in a trading trust may erect same and liability for the contracts and acts of the trustee shall not affect them beyond the property or assets embarked in trade through that trust, it seems proper to revert briefly to what has been said as to the relations of the trustee and the property to which he holds title to, his acts and contracts, and then consider the *cestuis que trust*, in trading-trusts, in inverse order to their classification in Chapter IX.

§ 68. *Liability of Trustee to Creditors.*—In Chapter V, *supra*, it was shown that a trustee is not an agent, but he is a principal;¹ that he adopts the same risks and liabilities as persons who trade on their own account;² that this extends in favor of creditors even when he does, as under a testamentary trust, what the will directs, unless he stipulates for exemption;³ that to release him from liability he must expressly stipulate,⁴ but this being done the stipulation is effective,⁵ especially if the instrument creating the trust provides that he may so stipulate.⁶ Merely, however, designating himself as trustee does not relieve from liability.⁷

¹Taylor v. Davis (1884), 110 U. S. 330, 28 L. Ed. 163.

²Hill on Trustees (4th Am. Ed.) 534.

³Roger Williams' National Bank v. Groton Mfg. Co. (1889), 16 R. I. 504, 17 Atl. 170.

⁴Shoe & Leather Nat'l. Bank v. Dix (1877), 123 Mass. 148.

⁵Bank of Topeka v. Eaton (1900), 100 Fed. 8; same case 107 Fed. 1003, 47 C. C. A. 140.

⁶Hussey v. Arnold (1904), 185 Mass. 202, 70 N. E. 87.

⁷Taylor v. Davis, *supra*.

§ 69. *Liability of Trust Estate.*—In the case last cited the court said: "The trust estate cannot promise", and notwithstanding it cannot, in the opinion it was said the trustee could stipulate that the creditor "is to look solely to the trust estate." In Chapter VI many English and some American decisions are produced to show that in active trusts creditors of the trustee may avail themselves of the trustee's right of indemnity out of the trust estate. In those cases the language used is upon the theory that this is the limit of the creditors' remedies. In other words, a creditor's sole contract right is against the trustee. As incidental to that, equity affords him a right by subrogation. In trusts embarked in trade it was ruled creditors have the personal responsibility of the trustee and "something like a lien upon the estate embarked in trade."⁸ There are a number of American cases cited to the same or nearly the same effect, all of which at least recognize the personal liability of trustees, one of them saying: "Generally the trustee must alone be looked to."⁹ In Chapter VII authority goes to show that the instrument creating the trust may provide for sole liability of the trust estate and that merely embarking the trust in trade is equivalent to an express direction to this effect. Whether, however, the latter clause of this statement be true or not, this authority considered no liability beyond that of the trustee or trust property, one or the other, or both.

§ 70. *Nonliability of Devisees, Cestuis Que Trust of a Trading Trust.*—Of course, the only basis for the predication of any such liability would be, that one accepting the income from the carrying on of a business thereby acquiesced in occupying the status of one who authorizes the acts of another in his behalf, or ratifies them by acceptance of benefits. It may be admitted, that a *cestui* under a will could not be regarded as one who previously authorizes the trustee of a trust embarked in trade to make contracts or perform acts in the prosecution of its business. Would he, however, by accepting benefits from

⁸Ex parte Garland (1804), 10 Vesey 110.

⁹Norton v. Phelps (1877), 54 Miss. 467.

acts he not only has not authorized, but which he could neither authorize nor control, be said to take the *onus* of responsibility by acceptance of their benefits? It is true, ratification implies the power to authorize in the first instance, and one form of ratification, as well as another, is subject to this implication. Thus, speaking of ratification by acceptance of benefits, it has been stated that this does not apply where one is legally entitled to what he has received without assenting to the act of the agent.¹⁰ But to apply this in the case of such a trust is reaching the end of what is aimed at, which is that there is a benefit vesting in the *cestui que trust* independently of his act or volition, but which presumptively he agrees to accept—a benefit vesting in the case of one *sui juris*, just as in case of an infant or one *non compos mentis*. It is to be taken, therefore, that, unless the trustee of a testamentary trading trust is under the direction and control of its *cestuis que trust*,¹ they cannot be made personally liable for his acts and contracts. Whether even in the alternative—most unusual, if not unprecedented—there would be the relation of principal and agent, need not be discussed. However, there is in decision by the Federal Supreme Court a ruling going beyond, and necessarily inclusive of, the theory of exemption from personal liability of *cestui que trust* of a testamentary trust embarked in trade.¹¹ Justice Miller said: “The object of the bill is two fold, namely, to subject the property of the deceased, which had not been embarked in the partnership enterprise, in the hands of the devisees, to the payment of the partnership debts, and to recover from the defendants money which they had received as dividends out of the profits of the business after the death of the testator.” None of these partnership debts were in existence at the death of the testator, but grew out of the conduct of the business subsequently. The plaintiffs were denied relief altogether. As to the dividends it was said: “No creditor whose debt was in existence when these dividends were made

¹⁰Baldwin Fertilizer Company v. Thompson (1899), 106 Ga. 480, 32 S. E. 591; Forcheimer v. Stewart (1887), 73 Iowa, 216, 32 N. W. 665.

¹¹Jones v. Walker (1880), 103 U. S. 444.

was injured. All the debts then existing have been paid. What right had subsequent creditors to reclaim these dividends, who had no interest in the matter when they were paid? * * * If these dividends had not been declared in good faith, nor really earned; if they had diminished the capital, or if, when they were made, debts existed which would have been left without means of payment, the persons sharing in the dividends would probably have been liable to these creditors to the extent of the money so received." If, however, creditors of the trust may not require even the return of benefits actually received, because entitled to be distributed according to the provisions of the will, *a fortiori* it is to be argued that *cestuis que trust* are subject to no personal liability for the acts and contracts of the trustee. In an English case cited and quoted from,¹² and which made a thorough review of English decision, it was said, in discussing whether the general estate of a testator was liable for the debts created by a specific part being embarked as a trust estate in trade,¹³ that the *cestui que trust* could "not set up a trustee, who may be a man of straw to make him bankrupt to avoid the responsibility of the assets for carrying on the trade." No other responsibility than that of trustee and assets is in the least hinted at, and creditors were precluded from going on other assets, in the hands of whomsoever they might be. Therefore it may be said with assurance, that a trustee of a trading trust created by will is the only contracting party and the limit of a creditor's right is to resort to the assets of the trust for the trustee's obligation—the trustee's indebtedness being of the same general character as that of any contracting party. So far, then, it appears to be ascertained, that at least by a will there may be a trust embarked in trade and that debts and defaults created by its management must depend solely and entirely for their discharge upon the liability of the trustee, with the right to resort or not, as the circumstances of a particular case may justify, to the assets embarked in trade. There should be noticed here a Mississippi case,¹⁴ expressly

¹²Chapter VI *ante*.

¹³In *re Johnson* (1880), 15 Ch. D. 548.

¹⁴*Norton v. Phelps* (1877), 54 Miss. 467.

approved by the Federal Supreme Court,¹⁵ where there was a deed of trust providing for the management by trustees of a plantation for the benefit of certain *cestuis que trust*. Creditors furnished supplies reasonably needed for its conduct and sought to subject the trust estate to payment therefor. The court said: "Generally the trustee alone must be looked to. He stands between the creditor and the estate. He represents the estate and deals for it. He is entitled to reimbursement out of the trust estate for all disbursements rightfully made by him on account of it, and creditors must get payment from him; but when they cannot do that, and it is right for the trust estate to pay the demand and it owes the trustee, or would owe him, if he had paid or should pay the demand, the rule founded in policy, which denies the creditor access to the trust estate, yields to higher considerations of justice and equity; and in order that justice may be done, the creditor may be substituted, as to the trust estate, to the exact position which the trustee would occupy, if he had paid or should pay the demand and seek to obtain reimbursement out of the estate." But no trustee could ever be supposed to have a right of action against the *cestui que trust*, and, therefore, through the doctrine of subrogation, no creditor of the trustee could derive an action against the *cestui que trust*.

§ 71. *Making Creditors Cestuis Que Trust by Deed of Assignment.*—A very elaborate case decided in North Dakota,¹⁶ hereinbefore referred to more than once, is one of the few decisions involving squarely the question whether *cestuis que trust* in a trust associated, so that a business might be carried on, became thereby merely principals of the trustee as their agent, and as such liable, as a partnership, for the debts created by the trustee in the conduct of that business. By this deed of trust the trustee was to convert the property transferred to him for the payment of the debtor's debts and to make new purchases

¹⁵Hewitt v. Phelps (1881), 105 U. S. 393.

¹⁶Wells-Stone Mercantile Co. v. Grover (1898), 7 N. D. 460, 75 N. W. 914.

and carry on the business should he deem this course wise. The creditors were sued by plaintiff for goods sold to the trustee and plaintiff rested his claim for recovery upon the trustee being given the distinct right to buy for the replenishing of stock. The deed said also: "Said trustee shall operate and manage said business in the ordinary way of retail trade, unless and until he shall become satisfied, that the interests of said creditors will be best subserved by closing out said business." This case was first disposed of by the court holding that the joining by the creditors was to be taken merely as assent on their part for their debtor to continue the old, and not establish a new, business. When, however, it was pointed out, on motion for rehearing, that the demurrer to the complaint was sustained as to the assignor as well as to the creditors, then the court said: "As the court below overruled the demurrer as to him also, we must, to sustain its action, hold that he, as well as his creditors, is not liable for the property sold to the trustee, while such trustee was administering the trust. Such is our view. The instrument created a trust which placed the control of the property and the business entirely beyond the assignor so long as the trust shall continue." Here is an unqualified statement to the effect that, in a legally created trust embarked in trade with control passing entirely from a settlor, the latter is not responsible for debts created in its management. The opinion then, after speaking of the trustee's accountability in equity for proper management, says: "It was the business of the trustee, so long as the trust continued; the assignor having only an indirect interest in the successful management thereof. He was not the proprietor of the business and the trustee was not his agent. It is always the case that the trustee has no interest in the management of the affairs confided to him by the trust instrument and that the *cestui que trust* is the only person beneficially interested therein. And yet it has never been held, or even supposed, that the beneficiary is liable for debts contracted by the trustee in so handling the property as to create an income for such beneficiary." Considering that this statement was made when a trust in trade was before the court and express power given to make purchases in

its conduct, its importance is manifest. In no whit abating from its comprehensiveness, the court further says: "The assignor by the trust deed parted with the ownership of property and all control over the business he had been carrying on." The court then says the assignor stood to the property, just as if the deed of trust had been made by a third person with the same resultant benefit to this assignor. The court also says: "There is no hardship in the doctrine that the beneficiary is not liable in such a case. The person with whom the creditor deals (i. e., the trustee) is himself personally liable. If such creditor is unwilling to trust him, such creditor can refuse to sell him on credit. And in a proper case the creditor may resort to the trust estate itself for his pay. It would indeed be an anomaly in the law, if one could be held responsible for goods that he had not purchased or agreed to pay for, and which were not sold to his agent, but were purchased by a third person to use in a business carried on by such third person, the defendant having no control thereover." It is impossible to see how a court could more pointedly declare that, howsoever a trading trust be formed, yet, if it be validly created and the trustee be in full control, no third person, whatsoever his interest in it may be, will be responsible for its contracts. In the court's ruling as to liability of the creditors its attention seems to have been drawn away by an English case¹⁷ from the broader question.

§ 72. *Review of the English Case Above Alluded to.*—Quite extensive reference has been made to *Cox v. Hickman*, *supra*,¹⁸ from another point of view. Here it may be well to lay emphasis on the point that all of the judges who found that the creditors were partners in control of the trust estate embarked in trade, created by the joint deed of a debtor and his creditors, so found because they were deemed to have control over him. But some of those and the Lords of the opposite view, thought there was no such control, and then too, for other reasons, the creditors were deemed not liable. In other words, it seemed

¹⁷*Cox v. Hickman* (1860), 9 C. B. (N. S.) 98, 8 H. L. C. 268.

¹⁸Chapter VIII.

to be with judges declaring the creditors liable a necessary ingredient of non-liability, that the trustee should be vested with full control, while, with those of opposite view, they might not have been liable, if the trustee's control were even limited. It might be said, therefore, that had all agreed in construction of the deed that the trustee had absolute control, he and the trust property only could be held, and not the creditors also.

§ 73. *Contributors Other Than Shareholders.*—It might be argued that the North Dakota case,¹⁹ above discussed, does not, so far as was necessary to its decision, embrace the proposition of solvent contributors to the formation of a trading trust not being liable for the debts and contracts of its trustee. The reasoning, it is true, is sufficiently comprehensive to cover such a proposition, but there it was said: "It was the business of the trustee so long as the trust continued, the assignor having an indirect interest in the successful management thereof." More accurately stated, the assignor had a resultant interest in the successful management. But an ordinary *cestui que trust* would have an immediate interest. But it is difficult to see how the quality of the interest, one being vested as well as the other and either capable of being reached by process at law or in equity by a creditor, is material. As seen, *supra*,²⁰ the legal title to accrued income in the *cestui que trust*, and, generally by the authorities cited in that chapter, anything reserved for the benefit of the *cestui que trust* is both alienable and subject to his debts and contracts, and that any other course is contrary to public policy.²¹ Therefore, it is concluded, that the principle which relieved the assignor in the North Dakota case is no way distinguishable so as not to embrace any other settlor of a trust embarked in trade. We have also seen *supra*²² that contributors to the formation of a trust for trading pur-

¹⁹Wells-Stone Mercantile Co. v. Grover, *supra*.

²⁰Chapter III; Broadway National Bank v. Adams (1882), 133 Mass. 170.

²¹Pacific Bank v. Windram (1882), 133 Mass. 175.

²²Chapter IX *ante*, citing Crawford v. Gross (1891), 140 Pa. 297, 21 Atl. 356 and Mallory v. Russell (1887), 71 Iowa, 63, 32 N. W. 102.

poses stand in every way to the trust as do shareholders in an unincorporated association. Therefore, the reason and spirit of any rule of law applying to one would apply to the other. Concert in action and purpose establishes an association behind the trust in the one case as well as in the other.

§ 74. *Nonliability of Cestuis for the Contracts of Trustee.*—It is sought to stress in every way the fact, that a joint stock company is in itself a partnership, and that there is individual liability of the partners for all acts and contracts of such partnership. But the claim is, that the members of a partnership as such may as well have an interest in a trust, the creation of which is the principal reason of there being a partnership *inter sese*, without their being personally liable for the contracts of the trustee of such trust, regularly incurred in its management. Thus recurring to the case of *Smith v. Anderson*,²³ referred to at such length in Chapter VIII, it is seen that it is not disputed either by the Master of Rolls, whose ruling was reversed, nor by the three Lords Justices, reversing him, but that such a partnership could be behind a trust embarked in business, where complete control is committed to the trustee. The Master of Rolls was overruled on two propositions. He held that the investment by the trustees in securities for the benefit of members of a partnership, their interests being represented by transferable shares, and looking after the sale and reinvestment of proceeds was a carrying on of business, and that the association or the partnership was formed to carry on business. The Lords Justices said that such an arrangement was not a carrying on of business and, even if it were, the association was not formed to *carry it on*. The Master of Rolls said the scheme was a very transparent one to endeavor to escape the requirements of an Act requiring registration of partnerships “formed for the purpose of carrying on any business that has for its object the acquisition of gain, where they include more than twenty persons.” The gainful purpose was admitted by all and, conceding that the design was that business should be carried on, all the Lords said the *partnership* was not formed to carry it

²³(1880), 15 Ch. D. 247.

on. It was admitted, too, by all of them, that though the managers were called "trustees", yet if "the duties they had to perform were really those of directors, then the legal effect of the deed would be that they would be directors, and if they are directors, they are agents." Then Brett, L. J., says: "But it seems to me clear that according to the true construction of the deed, they were not directors or agents, but trustees. If that be so, the certificate holders, even if they were associated at all, were not associated for carrying on the business." Being not so associated, the Lord Justice draws these conclusions: "It was not their business. *They could not have been made liable for any contract made by the trustees.*"²⁴ He proceeds then to emphasize these conclusions as follows: "It was of course urged that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts upon which they are liable are their agents authorized to bind them by their contracts *which is obviously not true.*"²⁴ The only reason for such obviousness is, of course, that the deed of trust did not create any agents but trustees. Colton, L. J., thus expressed his view as to personal liability of the certificate holders: "The fact that they (the trustees) are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting and hold themselves out as personally liable. *Those persons have no right whatever as against the persons beneficially entitled.*"²⁴ Further along he stresses this non-liability on the part of the certificate holders, as follows: "So far as there is any business to be carried on it is the business of the trustees, not as agents for principals behind, but their own business, that is to say, a business in which they contract as *solely liable to outsiders,*"²⁴ whatever may be their rights as against those for whom they are trustees."

§ 75. *Nonliability of Cestui on Contracts of Trustee—Cont'd.*
—While the question of liability of certificate holders was not directly involved in *Smith v. Anderson*, *supra*, yet this finding of non-liability cannot be considered as *obiter dictum*, be-

²⁴Italics by author.

cause the question whether there existed the relation of principal and agent, which was directly involved, contained the conclusion of liability *vel non* of the *cestuis que trust*, that is to say the certificate holders as members of a partnership interested in the trust but not, necessarily, behind the trustee. To ascertain whether there was the relation of principal and agent the status of trustee as known to the law was considered and it was declared there, as was said, in *Taylor v. Davis*,²⁵ by Justice Woods, a trustee was himself a principal, because of his having legal title and capacity to contract. *Ex vi termini* the creation of a trust estate is notice to one dealing with a trustee that he contracts in a personal capacity, unless he stipulates for exemption. It is well argued in *Bank of Topeka v. Eaton*²⁶ that a trustee could stipulate for exemption from personal liability, just as an individual might, without the essence of all obligation disappearing, if the former remitted the obligee to the trust property or the individual made a specific pledge of property as security. The stipulation by the trustee was regarded as valid solely for the reason that trust property is under control of a court of equity. In other words, a valid stipulation was needed to exempt a trustee from individual liability, just as a specific pledge is needed to exempt an individual not a trustee. No one disputes that an executor cannot bind an estate for his contracts for its benefit, though he have his right to reimbursement for proper expenditures. This case suggests that it might not have been impossible for the trustees under the declaration of trust to "have incurred indebtedness under such circumstances that the law would impose a personal liability on the shareholders," yet also squarely holds, that where the trustee gave a note referring to a declaration of trust which provided that only the trust property should be liable, then there was an implied agreement in accepting the note to abide by the terms of the articles of association. The case may, therefore, be deemed as direct authority on the proposition, that a trustee primarily liable may contract with a debtor that the trust estate

²⁵(1884), 110 U. S. 330, 28 L. Ed. 163.

²⁶(1900), 100 Fed. 8, expressly approved 107 Fed. 100, 47 C. C. A. 140.

shall be solely liable. If a trustee can provide for his own exemption from liability—his being a primary liability—*a fortiori*, it is to be said, that the creditor's agreement to look solely to the trust estate should bind him. In *Taylor v. Davis*, *supra*, the opinion quotes with approval the following from Story on promissory notes: "As to trustees, guardians, executors and administrators and other persons acting *en autre droit*, they are by our law generally held personally liable on promissory notes, because they have no authority to bind *ex directo* the persons for whom, or for whose benefit, or for whose estate they act, and hence to give any validity to the note, they must be deemed personally liable as makers." As appears by *Norton v. Phelps*, *supra*, approved in *Hewitt v. Phelps*, *supra*, the rule is not confined at all to written promises, but extends to those by parol, either express or implied. There is lack of "authority to bind *ex directo*" *cestuis que trust*. This principle is squarely recognized and its controlling effect made more manifest by a distinction reasoned out in a North Carolina case,²⁷ where a trust estate was held liable for negligence of the trustee. It was held liable on the theory that the beneficiaries were by the deed of trust "expressly given the right of interference and control in the main purpose of the trust," but even in such a case the trustee, it was held, would also be personally liable. One may not approve entirely this reasoning, but it at least goes upon the theory that a trustee always pledges his personal liability and only under special circumstances may creditors have any further remedy.

§ 76. *Nonliability of Cestui Que Trust on Contracts of Trustee—Continued.*—As said above in referring to *Wells-Stone Mercantile Co. v. Grover*, *supra*, that that case is one of the few decisions showing direct attempt to hold *cestuis que trust* liable for the contracts of a trustee, and even there the deed of trust was endeavored to be construed as a command by principals to their agent to do a certain thing instead of vesting him with

²⁷(1909), *Wright v. Caney River Ry. Co.*, 151 N. C. 529, 66 S. E. 588, 19 Am. & Eng. Anno Cas. 384.

title for a certain purpose with uncontrolled authority for its execution. In Massachusetts numerous cases appear, where interests in trust estates embarked in trade were represented by transferable shares in joint-stock associations, though that State has no statute specifically recognizing or regulating joint-stock companies. The furthest legislation has gone there has been, it is thought, to refer to such shares under its revenue laws. These associations there are regarded as partnerships and partnership liability has been enforced against holders of their shares, but never, the confident assertion is made, where title to the property or capital in trade was vested in a trustee to manage it, uncontrolled by the officers of the joint-stock association. In one of these cases only do we find any attempt to enforce partnership liability under such circumstances.²⁸ The opinion is brief and the statement of facts needs to appear somewhat fully. There was a declaration or deed of trust by an inventor of an improvement in pneumatic engines. This instrument vested in trustees grantor's interest in all patents in this and foreign countries, to hold, manage and dispose of the same or any part thereof to others upon such terms and conditions as to a majority of the trustees shall deem best and pay over net avails to scrip owners according to their several interests. Certain scrip was to be issued to take up outstanding scrip and "for the raising of additional capital for the more advantageous disposal of grantor's invention under letters already granted and those to be applied to foreign governments." It was alleged that a large amount had been sold. The trustees hired certain premises from plaintiff. A bill was filed praying for disclosure of the names and places of residence of the scrip owners as partners, that they might be summoned and thereafter a decree be entered that the trustees and scrip owners as co-partners owe the plaintiff, etc. A demurrer was sustained. On appeal this was affirmed. Allen, J., speaking for the court said: "The deed of trust does not have the effect to make the scrip holders partners. It does not contemplate the carrying on of a partnership business upon the joint account of the grantor and the scrip holders, and in this respect the case is unlike *Gleason v. McKay*, 134 Mass. 419,

²⁸*Mayo v. Moritz* (1890), 151 Mass. 481, 24 N. E. 1083.

and *Phillips v. Blatchford*, 137 Mass. 510. The scrip holders are *cestuis que trust*, and are entitled to their share of the avails of the property when the same is sold. If the trustees contracted a debt to the plaintiff, they are liable for it personally, and an action at law may be maintained by him against them. Creditors may also resort to the fund under proper circumstances." It is not intimated here that there was no business to be carried on. The case, however, would seem to need for its fuller understanding a consideration of the two cases it cites.

In the former of said cases the declaration of trust declared grantor held the property in trust for certificate holders. After its execution and the issue of certificates the shareholders held a meeting, chose an executive committee and adopted by-laws, and the business was run by an executive committee. The value of shares consisted chiefly in their interest in letters patent. The question in this case was of their taxability like shares in a corporation, but in the case the business was run by the shareholders, while in that which it refers to it was run by the trustees. In the other case²⁹ there was a partnership under a declaration of trust with transferable shares. The business was to be entirely under the control of managers, of whom the trustee was to be a member, and the other members were to be elected by the shareholders. In this case a shareholder as a partner was sued and held liable. Judge Holmes said: "If shareholders choose to purchase stock in a partnership with unlimited personal liability, it is their own look out." These two cases appear to explain very clearly the ruling in *Mayo v. Moritz*, *supra*. It means, we think, that a transferable share in a business conducted by an association issuing the shares is a business conducted on the joint account of the shareholders, while such a business conducted exclusively by trustees, is conducted merely in their interest as *cestuis que trust*. In the one case shareholders are liable; in the other, they are not.

§ 77. *Nonliability of Cestui Que Trust on Contracts of Trustee—Continued.*—Other Massachusetts cases squarely holding that members of a joint stock association have a partnership liability

²⁹*Phillips v. Blatchford*, *supra*.

should be noted. Thus a comparatively early case³⁰ shows a joint stock company formed under a constitution, which, among other things, provided that a board of directors should attend to the mercantile affairs. It was said: "The directors are to be regarded as the agents of the company and the members are bound by their contracts made within the scope of their authority. As to the creditors, each member is liable to pay all the debts of the company." In *Taft v. Ward*³¹ members of a joint stock company organized in another state claimed that creditors must sue the president and treasurer, as by the statute of its home state was provided. A limited liability was also provided by that statute, collectible after execution against the company was returned unsatisfied. It was held that the provisions were local and the company as to Massachusetts contracts was a mere partnership. There was no trust or trustee provided for but the "articles" intrusted: "The sole management of the business, stock, funds, property and concerns of the company to the executive committee, etc." The defendants sued as members were held liable as partners. In *Edwards v. Warren Linoline & Gasoline Works*³² it was attempted to sue a Pennsylvania joint stock company as such, but it was held this could not be done, and garnishment process based thereon was held invalid, *Taft v. Ward*, *supra*, and other Massachusetts cases being cited. The members had to be sued as partners in Massachusetts. An early case in which the opinion was by Chief Justice Shaw³³ is very instructive. A joint stock association was formed in Massachusetts in 1835 to carry on the lumber business. The articles provided, among other things, that: "The president and directors are charged with the general management of the interests of the company * * * and the agent of the company had authority to make contracts for labor and services, in the business of getting out lumber and to give the negotiable promissory note of the Company, in satisfaction of such labor and services." Holders of shares were held liable. Here it is seen there was no ques-

³⁰*Tyrrell v. Washburn* (1863), 6 Allen 466.

³¹(1871), 106 Mass. 518.

³²(1897), 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791.

³³*Tappan v. Bailey* (1842), 4 Metc. (Mass.) 529.

tion of trust estate at all, or a trustee managing same. The case is useful as showing the validity of transferable shares in a partnership. In a case decided in 1904,³⁴ there is discovered evolution of the crude arrangement shown in *Mayo v. Moritz, supra*, where scrip owners were denominated *cestuis que trust* and under no liability for debts created by the trustee. The opinion recites an agreement establishing an association "and appointing three trustees to conduct the business", the trustees to hold the title to all the property that was paid in or acquired, and to manage it, subject to the provisions in the agreement, as they should see fit. * * * The trust could be terminated by a writing signed by three fourths in value of the shareholders. * * * * Shares of \$100 each, taken by subscribers and represented by certificates, could be transferred. * * * * Each shareholder was to be liable for the amount subscribed by him, but he was not to be liable to any third person, nor for any amount in excess of his subscription. * * * All contracts entered into by the trustees shall be in their names as trustees, and shall provide against any personal liability on the part of the trustees and stipulate that no other property shall be answerable than the property in the hands of the trustees." These provisions in this agreement differ from *Smith v. Anderson* and *Cox v. Hickman, supra*, in specifically providing for freedom from personal liability by trustees and *cestuis que trust*, but such freedom was declared, as resulting as a matter of law so far as the latter were concerned, and it must be thought that the trustees under the Massachusetts agreement would not be released from personal liability except by stipulation. In *Smith v. Anderson* the liability of *cestuis que trust* as investors in securities would naturally cut so little figure as not to be thought of, while in *Cox v. Hickman* one of the Lords Justices said it was plain that no personal liability on the part of creditors of the assignor was intended to be incurred. In the former case there was an effort to avoid the companies act, but to do that the partnership relation in the carrying on of business had to be eliminated. This Massachusetts arrangement is for a partnership arrangement of members *inter sese* while it was not,

³⁴Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87.

if the English scheme was not, a partnership carrying on the business. In the English case it was said to be the business of the trustees, as *Taylor v. Davis and Wells-Stone Mercantile Co. v. Grover* *supra* similarly say. The question, however, of liability of shareholders did not arise in *Hussey v. Arnold* *supra*, but a trust created in and by the agreement was being disposed of by a court of equity, and its property was held sacred from levy under a common law writ against the trustees personally. The opinion says: "The trustees held the legal title to all the property and they alone could make contracts. Ordinarily, in the absence of special limitations, trustees bind themselves personally by their contracts with third persons. Actions at law upon such contracts must be brought against them and judgments run against them personally. This is because the relations of the *cestuis que trust* to their contracts are only equitable and do not subject them to proceedings in a court of common law, and the property held in trust is charged with equities, which hold it aloof from the jurisdiction of a court of law to take it and apply it in payment of debts created by the trustees. Such debts, if proper charges upon the trust estate, can be paid from it under the authority of a court of equity." Then the court, stating that it was open to the trustees to have provided against personal liability, further said: "If they did, these petitioners cannot maintain an action at law³⁵ against anybody. As agents and trustees under the agreement they were not authorized to contract any debt *which should charge the certificate holders.*" We have set out the reasoning in this case quite at length to show that, at least, these trust agreements are lawful towards the establishment of a trust for trading purposes, that contracts under them may be made only by trustees to affect the property constituting the trust, and that the shareholders merely have equitable interests in the trust property. No personal liability of shareholders was involved and there is nothing opposed to the ruling in *Mayo v. Moritz* *supra*, but on the contrary the reasoning is all in accord with that ruling. Certainly it must be true, that, if the trustees could stipulate,

³⁵The words "action at law" mean, of course, as distinguished from a suit in equity.

as the court said expressly they could, that the trust property should alone be bound, in release of their own liability, *a fortiori* should this be a release of shareholders, who bear merely an equitable relation to the business, while the trustees are stipulating against an ordinary legal liability. Cases from other courts will be considered in the chapter next following.

CHAPTER XI.

NONLIABILITY OF CESTUIS QUE TRUST OF A TRADING TRUST—

CONTINUED.

§ 78. *Shareholders in a Trading Trust.*—The general principle of liability of a trustee is thus expressed by the Illinois Supreme Court:¹ “The decisions are uniform that a guardian, executor, administrator, trustee or other person acting in such relation binds himself personally, unless he exacts an agreement from the person with whom he contracts to look to the funds exclusively. This personal liability does not depend upon whether the charge would be a proper one by the trustee against the fund or estate, or whether he should be allowed reimbursement for the money paid. That is a matter wholly between him and the beneficiaries of the trust.” This case expressly approves *Johnson v. Leman*² where the trust seemed to be an active one, and in which case the suit was by a broker against the successor of a deceased trustee upon an employment to secure a loan upon the trust property. This loan was agreed to be made, but before negotiations were completed the trustee died. His successor obtained the needed loan from another source. Recovery was denied, the court saying: “The general rule is that expenses of properly administering a trust are a lien in behalf of a trustee, on the estate in his hands, and he will not be compelled to part with his control of that estate until such expenses are paid. But this, unless it may be in exceptional cases, does not extend to persons employed by the trustee. In general their only remedy for compensation is personal against the trustee employing them.” While the sole pur-

¹*Bradner Smith & Co. v. Williams* (1899), 178 Ill. 420, 53 N. E. 358.

²(1890), 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 63.

pose of this suit was to make the trust estate liable, its entire reasoning is on the theory of a trustee and no other being personally liable, with the creditor, under certain circumstances, having a right to resort to the trust estate. The opinion says: "The rule can work no great hardship. If the trustee shall be unable to procure the services of necessary agents upon his own responsibility, let him apply to the chancellor for permission to charge the estate especially for that purpose." *Taylor v. Davis*, so frequently hereinbefore referred to, came up to the Federal Supreme Court from Illinois, and is one of the notable cases in this country of a company with transferable shares and the holders thereof *cestuis que trust* in a business conducted under the sole management and control of trustees. It has been seen that these trustees were held to a strict personal accountability for their contracts, and there is not a word in the very full discussion referring in the remotest way to any personal liability on the part of these *cestuis* for their contracts. On the contrary, Mr. Justice Woods uses the established principle, that trustees "have no authority to bind *ex directo* the persons for whom or for whose benefit or for whose estate they act," as persuasive to the conclusion, that the trustees in this trust, embarked in trade, with a joint stock company behind it, were personally liable, thus treating the shareholders in that stock company as *cestuis que trust* and nothing more. All of which is in full accord with the specific declarations of principles excerpted from the two Illinois cases last above cited. In Pennsylvania the status of shareholders in a joint stock company to property in a trust embarked in trade has been very accurately defined.³ In this case an unincorporated joint stock company was formed for buying and selling mineral lands. Its articles provided for title to all property vesting in trustees, and the interest of each member was to be measured by his shares of stock. It was said: "The partnership thus formed, whatever the liability of members to third persons may be, is an artificial person capable of acquiring, holding and selling property. * * * The relation of stockholders to the company is also settled

³*Oliver's Estate* (1890), 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894.

largely by the articles of agreement. They contribute the capital, select the trustees who are to use and invest it, and are entitled to a distributive share of the profits made in the business. As between themselves, however—it may be as to others, they are liable for losses in proportion to their stock.” Thus it is seen, that whether shareholders as *cestuis que trust* are liable to third persons or not makes no difference as to a joint stock company being a partnership. It is such whether there is or is not the usual feature existing in partnerships of joint and several liability on all contracts in its behalf. In other words, shareholders in a joint stock company, unincorporated, may be *cestuis que trust* with freedom from liability just as other individuals may be such *cestuis que trust*. That a definable interest in a trust estate created for business purposes may rest on stock ownership in an unincorporated association is also declared in a recent Pennsylvania case.⁴ A still later case from this State⁵ may be here again referred to, as showing that a trading trust may be created so that the business may be carried on as that of the trustees “as if they were the absolute owners thereof.” If this be true, it is immaterial whether *cestuis que trust* be individuals, corporations or the shareholders of an unincorporated association, or whether they be adults or infants. There is a very instructive decision in an early New York case.⁶ This case was decided in 1850 by Duer, Mason and Campbell, JJ., and shows that the vendees of a tract of land formed an association, with articles dividing their interest into transferable shares. They appointed directors to manage, improve and dispose of the land. On the same day the articles were signed they conveyed the property to trustees, the deed to them incorporating the articles of association. Yet, notwithstanding the power given to such directors, it was held that by the deed to the trustees the shareholders and directors had no power or authority over the land. Therefore an alleged dedication by said directors was held to be wholly void. To avoid this difficulty it was claimed

⁴Pittsburg Wagon Works' Estate (1903), 204 Pa. 432, 54 Atl. 316.

⁵Prinz v. Lucas (1905), 210 Pa. 620, 60 Atl. 309.

⁶Ward v. Davis, 3 Sandf. (Super. Court) 502.

that: "The trust deed effected only a technical alteration of the title, and the powers of the trustees were purely nominal." But the court quoted the following clause: "They are directed to sell and dispose of the lands conveyed at such time and times and in such manner, either at public or private sale, in such parts or portions and for such prices as to them or any two of them might seem most expedient." Then the court said: "If this discretionary power of sale was valid at all, it rendered it impossible for the directors, collectively or individually, by any act, resolution or representation to withdraw from the exercise of the power any portion of the land which it embraced. * * * * * Hence the clauses which have been cited from the trust deed must be either wholly expunged or the articles of association must be construed to mean that the powers which they give to the directors shall be exercised in subordination to those that the deed gives to the trustees." In this case many persons had purchased tracts upon the faith of a resolution by the directors dedicating a strip of land in front, which dedication would have been recognized but for the existence of the deed of trust. It is, therefore, thought, that no stronger case than this may possibly be produced to show, that trustees are not agents, because their discretionary powers absolutely overrode express powers granted to officers of this unincorporated association. Therefore it could not have been claimed in this case that the shareholders in this association were bound by their acts, when as the court said: "The shareholders and directors had no power or authority over the land."

The severity of the principle of trustee liability and no other is also strongly illustrated in a Rhode Island case,⁷ where trustees indorsed notes, as required in business exigencies by the will creating the trust, of which requirement the indorsee was aware. Counsel claimed that this would be "to punish them for the faithful observance, within the limits of their powers, of the trust imposed upon them, well known to the indorsee". The court said: "The situation of the trustees, if the trust

⁷Roger Williams Nat'l. Bank v. Groton Mfg. Co. (1889), 16 R. I. 504, 17 Atl. 170.

estate be insufficient to indemnify them fully for the debts which they have contracted, is indeed hard, but it is one in which they have voluntarily placed themselves, and though we may sympathize with them, we cannot on that account relax the rules of law in their behalf."

§ 79. *Shareholders in a Trading Trust—Continued.*—In *Clagget v. Kilbourne*,⁸ the Supreme Court held distinctly that a joint stock company formed for the purpose of buying and selling lands is a partnership, but this holding instead of militating against the conclusion, that the court should treat the property, the legal title to which was in legal trustees, as partnership property, caused the court to say that: "In this case the legal title is in the trustees, who are bound to account to the stockholders, the *cestuis que trust* according to their respective shares, after all debts of the association have been discharged." It was not necessary for the court to have added the last clause, and it is doubted whether this *dictum* is true, but, be it true or not, it in no way declares that a debt by the trustees is a debt of the association, and it could not be thus interpreted and be in harmony with *Taylor v. Davis*, *supra*, which also showed a joint stock company back of the trustees. If it is true, it would merely affect the right of a shareholder to sue a trustee or the right of a creditor of a shareholder to proceed as to the shareholder's interest in the trust property, subjects hereinafter to be treated. In 1906 this court considered the status of a share of a joint stock company as security to a National Bank and the right of such a bank to become the owner thereof.⁹ In that case, however, there was merely the general question presented of partnership liability attaching to ownership of shares in an unincorporated joint stock association. The facts, as gathered from the case, and as it was decided by Supreme Court of Ohio¹⁰ show that trustees held title to land in a syndicate agreement, with interest represented by transferable shares in an unincorporated association, and certain

⁸(1861), 66 U. S. (Black) 346.

⁹*Merchants' National Bank v. Wehrman*, 202 U. S. 295.

¹⁰Same case (1903), 69 Oh. St. 160.

powers were granted to them, namely platting the property, and leasing and selling it, paying the purchase money and the ground rents, and to pay the balance to the holders of certificates. But officers of the company appear to have made contracts for street improvements and to have managed its business and it seems to have been through by-laws and not by provisions in the deed to the trustees that their powers were defined. Therefore, they were agents and not trustees, though called trustees, as was well said by Brett, L. J., in *Smith v. Anderson*, *supra*. The State and Federal Supreme Courts both speak of the association, not the trustees, incurring the indebtedness. The trustees in this case seemed little more than holders of title. The ruling in this case was that a share in a joint stock company could not be acquired by a National Bank, so as to make the bank a partner, but the bank's title was not declared to be absolutely void. The latter question was not involved. The rulings by both courts in this case merely emphasized the principle of partnership liability in the ownership of a share in an unincorporated joint stock association, but do not at all touch the question of liability over for the contracts of trustees having as expressed in *Prinz v. Lucas*, *supra*, control of property, "as if they were absolute owners thereof." In a Kansas case¹¹ there were joint adventurers in a land purchase for purpose of speculation. This was declared a partnership. Title to the property was taken in the name of one of them, who was not even designated trustee. He and his wife gave a mortgage for balance of purchase money. The joint adventurers controlled the enterprise, severally contributing to purchase of land and the payment of taxes and other expenses. It was urged they were merely *cestuis que trust*, but the court said: "The mere fact that the title was taken in the name of one of the parties, who executed a mortgage for the unpaid purchase money, cannot change the relationship of the parties or the ownership of the property, as he was no more than a trustee holding the title for the convenience and benefit of all interested parties." Here the trustee, if he was such, was under the con-

¹¹*Jones v. Davies* (1899), 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354.

trol of the association and the members were maintaining the business, of which one was the mere figure head. To him no control was surrendered and, had he repudiated their control, equity would have afforded relief. With a trustee given by an instrument creating a trust full control the case is vastly different.

§ 80. *Liability in General Aspect of Shareholders in Unincorporated Associations.*—Among the early noted decisions in New York is that of *Warner v. Beers*,¹² decided in 1840 by New York Court for the Correction of Errors. There Senator Verplanck at page 145 speaks of powers essential to the being of a corporation and powers which are merely accessory; the latter of which “may be enjoyed by unincorporated associations.” Speaking of the latter he says: “Such a power is the transferability of shares, whereby investments may be made without the owner losing future control of his funds under change of circumstances. Such too is the limited responsibility by which the stockholder, having once fairly paid up his share of the capital, is exempted from further personal liability. So too the convenience of holding real estate for the common purposes exempt from the legal inconveniences of joint tenancy in common. Again: There is the continuance of the joint property for the benefit and preservation of the common fund, indissoluble by the death or legal disability of any partner.” Again on page 149 he said as to transferability of shares: “This transferability may be formed in many sorts of trusts,” and he cites the “Tontine of New York,” “originally settled by the most eminent counsel of this State, and its validity attested by nearly fifty years’ experience” and never impeached though its shares “have passed through courts, insolvencies, bankruptcy commissions and distribution of estates.” The articles of the Tontine date from 1793. On page 150 the Senator spoke of exemption from personal liability as being the “most familiar distinction in the general and popular understanding” between corporations and partnerships, and then he argued that it is settled law that: “When a creditor has notice that by an arrange-

¹² 23 Wend. 103-190.

ment between partners, one of them, though appearing to the world as a partner, shall not participate in the loss, and shall not be liable for it, the creditors will be bound by the arrangement." On page 151 he makes this very significant statement: "The original articles of the Merchant's Bank,¹³ in the City of New York, as an unincorporated association, with limited liability, as well as transferable shares, which were read in argument (in this case) have the great professional authority of Alexander Hamilton, who prepared them, and of the eminent men who joined in them and whose professional distinction gives to their approbation the character of a sort of judicial sanction; whilst the restraining act passed soon after proves, as was unanswerably argued, that the legislature and its legal advisers considered such a voluntary association, thus restraining its own liability, not as a violation of common law or natural right, but merely as contradicting the financial policy of the state." Of course, this action by the legislature was taken by virtue of the State's police power over the business of banking. If, then, notice that one is a trustee, and not an agent, is by any possibility not sufficient that a *cestui que trust*, be he such as a shareholder in an unincorporated association or an individual, minor or adult, is not to be held liable for a trustee's contracts, yet, if the articles of an association are brought home to parties dealing with the trustee and they provide exemption from personal liability of a *cestui que trust*, settled law must be overturned to make him liable.

§ 81. *Summary.*—In this and the next preceding chapter it has been attempted concretely to show what has been foreshadowed in all that has preceded them as a necessary ingredient to the association of shareholders in a business enterprise, who by force of their common law rights, may acquire the same interest in that enterprise as a stockholder in the assets of a corporation and the same personal immunity from its acts and contracts. The cases cited and quoted from in these chapters either rule these propositions directly or supply the major premise from which they necessarily flow. Indeed, it may be well

¹³These articles are set forth in the back of this book.

thought, that the latter is so evident, that rarely has it been attempted to contend that any *cestui que trust* is a mere principal of a trustee. The mere statement of such a proposition involves a contradiction in terms, or at least, is opposed to all theory upon which equitable jurisdiction has attached in favor of beneficiaries in property to which they have no legal title. This is as thoroughly established as that a bailor may be entitled to compensation for a bailment, or a lessor rent for his tenement, and neither be liable for the contracts of the bailee or a tenant as such. That the relation of principal and agent does not apply as to a trustee of a trust in equity and that such a trust may be embarked in trade, appear thoroughly shown, and also that the *cestuis'* interests may be evidenced by transferable shares. It also has been shown that the trustees of a trust in business can employ, as occasion may require, every power granted by the instrument creating the trust and that articles of association for the formation of a business enterprise are subordinate to the powers thus granted, if any conflict exists.

It is reserved for a succeeding chapter¹⁴ to consider the *cestuis'* obligations on their unpaid subscriptions as being assets of the trust estate.

¹⁴Chapter XVIII *post*.

CHAPTER XII.

RELATION OF SHAREHOLDER TO TRUSTEE.

§ 82. *Preliminary.*—We have endeavored to show that the quality or character of a beneficiary in a trust has no relation whatever to the question of his being personally liable for the acts and contracts of the trustee. A beneficiary appears to be bound, if one designated as trustee is under his control, for then he is but an agent, by whatsoever name he may be called. If with the legal title there is committed as full control to the trustee, as if he also possessed the beneficial interest, the cases cited, quoted from and discussed demonstrate, that all contracts by him are his contracts and without any exemption of personal liability therefrom, unless he stipulates expressly therefor. Supposing, therefore, that certificate or share holders in the property of a trust embarked in business are not liable as *cestuis que trust* for the acts and contracts of its trustees, it is material to inquire, whether from any other aspect such holders may be partners *inter sese* or with respect to the trustees or otherwise.

§ 83. *Are Shareholders Partners Inter Sese?*—In *Smith v. Anderson*¹ an association, whose membership was determined by the ownership of shares, with the business for which it was formed to be carried on by trustees, was assailed as being illegal under the English Companies Act, which forbade the formation of a partnership “for the purpose of carrying on any business, etc.” where it consisted of more than twenty persons, unless there was registration required by the act. Brett, L. J., said: “I should hesitate to say, that by the ingenuity of men of business, there might not some day be formed a relation among twenty persons, which, without being strictly a com-

¹(1880), 15 L. R. Ch. Div. 247.

pany or partnership, might yet be an association," and at all events he thought the association, whether it be a partnership or not, did not come under the act, because it was not formed "for the purpose of carrying on business."

James, L. J., dwells also on the fact that the business was to be carried on by the trustees and then says: "I cannot find that this deed constitutes any association whatever between the persons who are supposed to be *socii*. One man goes with £90 in his hands and buys from the trustees a £100 certificate with all the chances of profit attaching to it. Another man goes the next day and takes his £90 to the same people and gets from them another certificate, by which he gets a right to share in the funds in their hands. The first man knows nothing of the second, and the second knows nothing of the first, they have never come to any arrangement whatever as between themselves. There has never been anything creating mutual rights, or obligations between those persons." These views are seen to assimilate shareholding in a trust to that in corporate capital, to regard the trust as distinctly a separate entity as is corporate capital, in short, to make both stand on the same footing, with abuse in management of the one subject to the same intervention on the part of courts, at the instance of shareholders as the other, though possibly under statutes the manner of procedure might differ. Thus applying the English principle it might be said the partnership idea disappears and nothing more stands between the *cestuis que trust*, represented by a certificate, and the trustee, than is between a stockholder in a corporation and its board of directors.

In one of the Corporation Tax Cases,² wherein it was held that a trust in real estate, whose beneficiaries were shareholders, was not subject to such tax, the record shows that the property constituting the trust was originally owned in fee simple by tenants in common. They conveyed it to trustees in consideration of the issuance of certificates as evidence of their former interests, respectively, in the property. Distinguished counsel for one of the certificate holders, claiming the trust estate

²Eliot v. Freeman (1911), 220 U. S. 178.

was not subject to the tax, use in their brief the following language very pertinent to the position endeavored here to be made clear: "The issue of certificates of shares did not turn either the beneficiaries or the trustees into an association or a company. If there had been no such certificates, the owners would have been entitled to the same shares in the beneficial interest and could have transferred or otherwise dealt with them. The certificates provided an easy means of making the transfers and removed any occasion for otherwise examining the title to the beneficial interests. If there had been no certificates issued for the shares of the owners in the equitable interest, nobody would have dreamed of calling the trustees, or the beneficiaries, or both together, a *joint-stock company* or association."

If this is true, why also is it not true as said by James, L. J., *supra*, that there is no association, because there are no "*socii*" in such a trust? All the decisions about liability of *joint-stock companies* and voluntary associations were where they control or carry on business and not where a number of individuals have interests as beneficiaries in a trust estate. How that interest appears is itself a question for a court of equity, for, if statute determine this, equity would merely follow the law in recognizing what it declares.

Of the two trusts involved in *Eliot v. Freeman*, *supra*, the other was formed by subscription to shares just as in *Smith v. Anderson*, *supra*, and in one opinion the Supreme Court treats them both as *trusts* and not as *joint-stock companies* and holds them as *trusts* not liable to the corporation tax.

Eliot v. Freeman, *supra*, seems particularly appropriate in contradistinction with another one of the Corporation Tax Cases,³ decided the same day. In this latter case, a syndicate, a corporation, was held not liable for the tax because it had so amended its articles of incorporation that its sole authority was to hold title and receive and distribute rentals and the pro-

³*Zonne v. Minneapolis Syndicate* (1911), 220 U. S. 187.

ceeds of any land sold among its stockholders. This was said not to be a carrying on of business. The trusts above spoken of also relied upon this ground, but the court preferred to declare their non-liability upon the ground above indicated. The two decisions show unmistakably that it makes no possible difference in what way interests in property are evidenced—whether by the instrument of trust or certificates of shares thereunder. In either case the owners may be *cestuis que trust*, and a trust estate exists independently; that is, it is a legal entity separate from them just as a corporation is a legal entity separate from its shareholders.

§ 84. *The Massachusetts View.*—That the figment of partnership merely arising out of the manner whereby subscriptions to shares in the capital of a trust are obtained, does not entirely disappear, reasonably may be claimed, for some purposes at least, seems warranted by Massachusetts decision. Thus in a recent case⁴ the question was whether certificate holders were taxable at their residences or the capital or property of a trust was taxable where it carried on business. The court said: "The question arises from the fact that petitioners are trustees of an association of shareholders in an enterprise for the purchase, improvement and management of real estate for gain. If their relation to the certificate holders was merely that of trustees and *cestuis que trust*, the interest of each beneficiary in the trust estate would be taxable in the city or town of his residence, if within the Commonwealth (citing statute). If the certificate holders in the trust are partners within the meaning of section twenty seven of the chapter just cited, their property was all taxable in the City of Boston, where their business was carried on." This section provides for taxing partners, wherever they may reside, under their firm name for all personal property employed in the business, where it is carried on. If there are two or more places where the business is carried on, then at each place proportionately according to the property in each place. The court then proceeded as follows: "There is no doubt that they are joint owners of the property

⁴Williams v. Boston (1911), 208 Mass. 497, 94 N. E. 808.

for whose joint benefit the business is carried on, in which profits or loss will affect them all proportionally through the increase or diminution of the value of their respective interests in the trust. There is a provision in the agreement of trust that neither they nor the trustees are to be liable personally for all the debts of the trust, and in this respect their relation to the business is like that which appeared in *Hussey v. Arnold*, 185 Mass. 202. In *Gleason v. McKay*, 134 Mass. 419 and in *Phillips v. Blatchford*, 137 Mass. 510, similar trust agreements were held to create partnerships. We do not think the provision exempting the certificate holders from personal liability for the debts should be held to defeat the application of this section to the trust as a partnership. The decisions already made hold that the transferable quality of their interests and other provisions for conducting the business, similar to those of corporations, do not prevent their relation from being that of partners. In the leading and substantive features that distinguish ordinary partnerships, this association is within the spirit and meaning of the law of partnership. The limitations upon the power and liability of individual members and the attempt to avail themselves of many of the privileges of stockholders in corporations relate more to details and to the machinery of management than to the substantive purposes of the enterprise."

So far the court appears to concede, at least for the sake of argument, that the provision of exemption from personal liability is valid, but taxation cannot notice such a detail, and this idea is enforced by what the court next says, as follows: "There are reasons of policy why the members should be held as partners within the meaning of this section, for as trusts are not regulated by statute, and no returns are required of them, interest in them held by non-residents of the city or town where their business is conducted would be liable to escape taxation, unless the property is taxed in the firm name."

It is also suggested, that the intent of this exemption from liability is the creation of a benefit or status in favor of the certificate holders purely in regard to matters of the trust. What-

ever, therefore, may be the relation created between the trustee and the certificate holder, even making it that of trustee and *cestui que trust*, the State for purposes of taxation takes no account of it, because it may interfere with its policy.

It is also to be observed that it is conceded, as was pointed out *supra*,⁵ that in the cases referred to there was no exemption from personal liability and it might have been stated, that, by the provisions of the articles of association there considered, the business was conducted by the associations, this feature being especially adverted to in a later case,⁶ also considered in Chapter X *supra*.

In another case,⁷ decided shortly after that of *Williams v. Boston*, *supra*, and in which the opinion was also written by Knowlton, C. J., it appears that a railroad owning a large body of land in Boston, formerly occupied as a station, made a deed to trustees who were to issue to it a certain number of shares of a nominal par value of \$100 each, and the interest of shareholders or *cestuis que trust* was to be represented by these shares. The trustees were also authorized to issue additional shares not exceeding a certain number to obtain money to be used in conducting the enterprise the trust was formed to manage. This enterprise designed the trustees to have control over and dispose of the real estate, including the power to improve it by building thereon, to issue notes and bonds by mortgaging the property, etc. It was also provided that the trustees were to have no power to bind the shareholders personally, nor were they to be personally liable for claims or debts against the trust. The court, after giving several reasons why, as *ultra vires* the corporation, the deed to the trustees was void, further said: "Moreover, if other stock is issued by the trustees and other parties are brought into the enterprise and other lands are bought, the railroad corporation will be in a community of interest in profits and losses, and in all the activities of the busi-

⁵Chap. X, § 76.

⁶*Mayo v. Moritz* (1890), 151 Mass. 481, 24 N. E. 1083.

⁷*Williams v. Johnson* (1911), 208 Mass. 544, 95 N. E. 90.

ness, with other owners. It will be virtually, if not technically, in a partnership with them. It is familiar law that a corporation cannot enter into a partnership."

It would not be strictly in a partnership for the reason stated by James, L. J., in *Smith v. Anderson*, *supra*, as follows: "Persons who have no mutual rights and obligations do not according to my view, constitute an association because they happen to have a common interest or several interests in something which is to be divided among them." The Massachusetts court well qualified its statement that the corporation would be in a partnership.

The court further says: "Most of the reasons for this rule are as applicable to the present case as to an ordinary partnership. * * * * * Through the trustees who represent the interests of new shareholders as well as of those of the creator of the trust, the rights and interests of the railroad corporation are controlled in part for those who are not members of it or peculiarly interested in it." Here, then, it is disclosed that, merely because the trustees could no longer look with an eye single to the interest of the railroad as sole beneficiary, there was, something so nearly akin to the partnership idea, so far as inhibition on a corporation being in a partnership was concerned, that the scheme was condemned. Exactly for the same reason might a corporation's investment in the stock of another corporation be condemned, the directors of that other corporation being obliged to consider the interests of other stockholders, as well as those of the investing corporation.

These cases seem in no way to negative the principle impliedly expressed in *Smith v. Anderson*, *supra*, that where the entire business is carried on by trustees, there is a direct responsibility to certificate holders as *cestuis que trust*, but, on the contrary, much to support this principle. It is only, as seen, for special reasons or from the view of public policy that such certificate holders are declared to be "virtually, if not technically," partners.

§ 85. *Rights of Cestuis Que Trust Against a Trustee.*—That the courts will lend their aid in the fullest way to protect the interests of a *cestui que trust*, when for any reason those interests are adversely, or even where there is reasonable apprehension that they may be thus affected, ought to need no discussion or citation of authority. To intimate to the contrary is to doubt the maxim *ubi jus ibi remedium*. Any misappropriation of property or of its rents and profits, and in general, any failure to carry out the terms of a trust give a right of action in behalf of a *cestui que trust*, and where the trustee's acts are inconsistent with his duties to the trust, he may, at the instance of the *cestuis que trust*, be removed. Even the existence of circumstances which tend in any way to discourage or endanger a fair and faithful administration of the trust is cause for removal. As showing how jealous is the law on this subject it has been said: "The power of a court of equity to remove a trustee and substitute another in his place, is incidental to its duty to see that trusts are properly executed; and may be properly exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries that his continuance in office would be detrimental to the trust."⁸ In some circumstances a *cestui que trust* may sue his trustee at law. For example when an amount due a *cestui que trust* is established and made certain.⁹ If there is an express promise by the trustee to pay the *cestui que trust* a certain part of the income an action at law will lie thereon.¹⁰ Dividends may be sued for at law,¹¹ and where a trustee has in his hands money which in equity and good conscience belongs to one, an action at law therefor is an ample and complete and, therefore, the appropriate

⁸May v. May (1897), 167 U. S. 310, 17 Sup. Ct. Rep. 824, 42 L. Ed. 179.

⁹Johnson v. Johnson (1876), 120 Mass. 465.

¹⁰Husted v. Stone (1896), 69 Vt. 149, 37 Atl. 253; Weston v. Barker (1815), 12 Johns (N. Y.) 276; Dias v. Brunnell's Executor (1840), 24 Wend. 9.

¹¹Harrison v. Belden (1857), 26 Conn. 67.

remedy.¹² So far as income is concerned where it is made payable to a beneficiary it is never deemed vested in the trustee, but "the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him."¹³

No reason is perceived why a wrongful withholding should compel a resort to equity, instead of an action at law, to compel its payment. It goes without saying, that if there does exist an action at law as to what affects only one of a number of trustees, the others need not be joined. The judgment being against the trustee in a personal capacity the trust estate is not affected.

The rule has been stated by a well-known author¹⁴ as follows: "If the share of one of the several *cestuis que trust* in a trust fund has been ascertained and set apart—as where it is a moiety or other aliquot part of a fund—a suit for breach of trust may be maintained against the trustee by the persons entitled to that share without joining the other *cestuis que trust* as parties." It would seem to follow, that the same could apply as to interest or income accruing in favor of a *cestui que trust*. Indeed the general rule that the income of the trust estate is assignable by the *cestui que trust*, and may be alienated or charged with his debts, is equivalent to saying that the trustee withholding same after it has accrued is subject to suit therefor.¹⁵ But such rights and liability necessarily imply that they attach as to each of several *cestuis que trust* and not to them as a whole.

§ 86. *Cestuis Que Trust Represented by Certificates of Shares.*—There seems never to have been any question raised as to interests in a trust estate being made dependent on the ownership of shares as provided by the instrument creating the trust. No one has ever appeared to have the hardihood to suggest

¹²Crocker v. Rogers (1870), 58 Me. 339.

¹³Broadway Nat'l. Bank v. Adams (1882), 133 Mass. 170, 43 Am. Rep. 504.

¹⁴Hill on Trustees * 519 citing authorities.

¹⁵2 Beach on Trusts and Trustees, Secs. 712, 713, 715.

anything to the contrary. The trustee accepts the title and the trust in recognition of beneficiaries so identified and the creators of the trust, reserving to themselves the entire equitable estate, contract *inter sese* what shall be evidence of its aliquot parts, or rather, to speak more accurately, evidence of the original and subsequent vesting of prescribed interests in such equitable estate and how transfer of such interests may be effected.

Therefore it follows, that each certificate holder, being a *cestui que trust* in a business, "in which," as said in *Williams v. Boston*, *supra*, "profits and loss will affect them all proportionally through the increase or diminution of their respective interests in the trusts," must have the right to proceed severally as any other *cestuis que trust* may, unless there is a partnership or association, which gives it the right alone to receive from and receipt to the trustee for the income.

The nature of property which is evidenced by transferable certificates of shares in real estate, the title to which is vested in trustees, where the business carried on by them was speculating in lands, is thus declared in a Pennsylvania case¹⁶ in speaking of a particular shareholder: "The interest of the stockholder in the company property is controlled by his relation to the company under his agreement and by the nature of the business done. The object in buying was not to mine or operate in any other manner, but to sell again so as to make gain by the purchase and sale of land, and the articles provided for the division of the profits made by such purchase and sale among the stockholders. The interest of each member was therefore an interest in the profits made. He had no title to the land bought by the trustees for the Company, as a tenant in common or otherwise and could neither convey nor encumber it. His interest in it was personal estate and the extent of that interest was shown by his certificates of stock." If each certificate holder is the owner of personal property, he, of course, has the exclusive right to call the trustees to account with reference to

¹⁶Estate of Oliver (1890), 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894.

his interest, or to join with other certificate holders in seeking an accounting not affecting remaining certificate holders.

Even though for some purposes, as for example taxation as pointed out,¹⁷ or in the spirit of the rule against a corporation going into a partnership,¹⁸ a voluntary association formed merely as an incident in the creation of a business trust may be deemed a partnership, yet, if it is not designated itself to carry on any business and no one holds himself out or is authorized to hold himself out as capable of contracting for the association, is there a partnership? Even in voluntary joint stock associations carrying on a business it is not every member that can bind the others as partners. It is only in "an ordinary partnership, unless special provision is made in that behalf, each partner may act authentically in the business of the company and bind the company thereby."¹⁹

Thus it has been stated by a text writer in speaking of unincorporated joint stock associations: "If the concern is composed of numerous members, and is governed by managers there is no implied power in the other members to act."²⁰ In a Texas case it was attempted to hold the members of a joint stock association as partners for money advanced by a bank upon the order of the association's manager without authority of its directors, and they were held not liable,²¹ the court saying that it was expressly provided by the articles of which the bank had notice that: "The board of directors alone shall have power to contract debts against the concern."

In 17 Am. & Eng. Encyc. of Law, p. 638, it is said: "Although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities, from a partnership constituted between a few in-

¹⁷Williams v. Boston, *supra*.

¹⁸Williams v. Johnson, *supra*.

¹⁹Walker v. Wait (1878), 50 Vt. 668.

²⁰1 Bates on Partnership C. III Sec. 72.

²¹William Cameron & Co. v. First Nat'l. Bank (1893), 4 Tex. Civ. App. 309, 23 S. W. 334.

dividuals who carry on business jointly, with equal powers and without transferable shares. All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such has no power to contract for the company. For this purpose it is wholly immaterial whether the company is incorporated or unincorporated."

If, however, it has no business to be managed, but its members are represented as *cestuis que trust*, and no power has been conferred on any officer or director to manage any business for it, then by the instrument establishing the trust and the trustees' acceptance thereof and action thereunder is not an immediate, and not an indirect, relation established between the shareholders and the trustees? The moment it appears that there is direct responsibility by the trustees to the shareholders of course, the general principles of equity in favor of *cestuis que trust* become operative.

In a very elaborate opinion by the Supreme Court of Idaho²² the nature of voluntary unincorporated joint stock associations is treated, and therein it was held that, though certain officers of such an association entered into an agreement with another, it did not bind the shareholders, as partners, because power therefor had neither been given nor ratified, in a word, the authority of such officers was construed in the same way as that of officers of a corporation. Similarly it was ruled in a Texas case.²³

§ 87. *Theory of Trustee's Responsibility to the Association.*—The record in *Clagett v. Kilbourne*,²⁴ frequently hereinbefore referred to, is very incomplete, as published, but the court there regarded the debts created through the acts of the trustees as acts of a joint stock association, whose articles gave them authority to perform certain acts. It does not appear whether

²²*Spotswood v. Morris* (1906), 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665.

²³*Willis v. Greiner* (1894) (Tex. Ct. App.), 26 S. W. 865.

²⁴(1861), 66 U. S. (Black), 346.

these trustees were vested or not with full discretion, or if they were under the control of the association. It seems, however, they performed some acts, presumably by direction or consent of the stockholder, for which express power by the articles was not granted. At all events an association was called a partnership and responsible for all indebtedness arising out of the platting, improving, buying and selling of lands for which the association was organized. A judgment creditor of a stockholder levied an execution upon an undivided interest corresponding to his debtor's interest in the property, upon particular lots. It was held that this could not be done, as the debtor of a partner could only levy on his interest in the partnership, and what that was could only be ascertained after settlement of partnership liabilities.

Still viewing the association as a partnership and the trustees as its agents the court said: "In this case the legal title is in the trustees, who are bound to account to the stockholders, the *cestuis que trust*, according to their respective shares after all debts of the association have been discharged. The equity of the judgment creditor is the interest in the land, after a sufficient portion of it has been disposed of for this purpose."

This case is not like a case of trustees managing property producing income for distribution among *cestuis que trust*, but managing property in which a surplus was to be distributed after cost of purchase and expense in handling should be refunded. This surplus was to be profit and not income from use, and in that aspect the partnership idea cut no figure, the equity of the stockholders being the same whether the property was handled by the association or the trustees. Nevertheless the general principle is stated, that where the association does carry on business through its officers or agents it is a partnership, and even if there is liability by a trustee directly to shareholders, it is only after the association's debts are paid. But, if the association does not, as shown by *Smith v. Anderson*, *supra*, carry on any business, then it contracts no debts and there is nothing to come between a trustee's accounting "to the stock-

holders, the *cestuis que trust*”, and there is no authority by any officer or director given by articles of an association to contract any indebtedness, the partnership debts, which this decision speaks of, cannot exist. This theory of direct responsibility of the trustees to shareholders is shown in a recent decision by the Supreme Judicial Court of Massachusetts,²⁵ where some, but not all, of the shareholders joined in a suit against trustees of a trust estate capitalized at an amount divided into shares. There was a decree in favor of the shareholders, with recovery to be ratably distributed, and, as showing particularly how each interest was considered separately, the trustees were held not liable to account to a shareholder for losses caused by their misconduct participated in by such shareholder, but to all the others according to their respective interests. It is to be noted here also that this trust was formed in a way very similar to those considered in *Williams v. Boston* and *Williams v. Johnson*, *supra*, and this later case aids the construction hereinabove urged as to these cases.

§ 88. *Summary*.—It would seem, therefore, reasonably established, that, at least, if the instrument creating a trust for business purposes, in which trust interests are represented by transferable shares, intends that there shall be direct accountability of its trustees to the holders of the shares, such relation will be fully recognized as that of trustee and *cestuis que trust*. That being true, it would follow, that the usual equitable remedies, and those at common law when applicable, could be employed when a shareholder’s interest separately considered needed their aid. As to any limitations attaching to a shareholder being one of a great number of *cestuis que trust*, it is thought he would stand no differently than, if he was one of a great number of other *cestuis que trust* whose interests are not thus defined.

²⁵*Ashley v. Winkley* (1911), 209 Mass. 509, 95 N. E. 932.

CHAPTER XIII.

PERPETUITIES AND RESTRAINTS UPON ALIENATION.

§ 89. *Trusts by Settlers for their Sole Benefit.*—A perpetuity is obnoxious to American jurisprudence, primarily because it creates an absolute suspension of the power of alienation. The creation of a trust naturally suggests, though it does not necessarily involve, the idea of such suspension. The suggestion, however, does not create a disfavor against trusts, for they are favorites of equity. At most, it inclines the mind to scrutiny to see whether under the cloak of a trust any undue restraint upon alienation is attempted, the law of every state permitting some restraint. But trusts, as holding high place in jurisprudence, are truly portrayed by an eminent legal author as follows:¹ “The system of trusts is now so thoroughly recognized that, according to the laws of property in England and in other countries where the English common law is in force, it is one of the rights of ownership that this division of the complete title should, if desired, take place. If the absolute owner of the property wishes for any reason to have the equitable title only vested in him and the legal title outstanding in another, he has a perfect right to hold and enjoy his property in that way. Nor is it necessary that the *cestui que trust* should be under any disability in order that he may enjoy this privilege. A person *sui juris*, and who is absolute owner of property, may avail himself of the system of trusts, and may keep the legal title outstanding in another as long as he sees fit so to do.”

Mr. Bispham, in saying this, also had in mind the ordinary constitution of a trust for the benefit of others than the creators, as, of course, is universally the case of a testamentary trust and, generally, of other trusts. But basing the right to create at all on ownership, he deduces the principle that “division of

¹Bispham's Principles of Equity (6th Ed.) Sec. 49.

the complete title" may be as well for one's own enjoyment of the equitable interest as for that of another. This proposition was discussed by Lord Cairns as follows: "The arguments on behalf of the respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding *indicia* of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that, therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. That is a very serious proposition. It goes not merely to shares, but it goes to land and to every other species of property; and it goes to say that, whereas there is a large, well-known, recognized and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women or persons with limited interests, and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law."² The other Lords agreed. This case was followed later,³ Chitty, J., saying that it was "the case of an ordinary trustee holding property of the kind in question for a *cestui que trust*."

That a testator may create a trust and vest both the income and remainder in the same persons and they, though their inter-

²Shropshire U. R. & C. Co. v. The Queen (1875), L. R. 7 H. L., 1. c. 507.

³Carritt v. Real and Personal Advance Co. (1889), 42 Ch. D. 263.

ests may be reached by creditors, may not by their joint act terminate the trust in contravention of the express provisions of the will, has been held.⁴ The court said: "While the will vests the fund in the testator's four children, it does not give them an absolute estate and then impose restrictions and conditions repugnant to the estate, but gives an ownership qualified by the directions that the property is to remain for a time in the hands and control of the executors as trustees. Whether the testator made these provisions for one purpose or another is immaterial, since he had the right to order as he did." This case shows a "division of the complete title" exactly in the way that results from a settlor conveying the legal title to a trustee and reserving the entire equitable interest in himself, except that it will scarcely be said he could not revoke his own directions that the property should remain in the hands of his trustee for a time less than that appointed, a consideration to be adverted to later on in this chapter. Indeed it will be inquired further along whether or not this very right of revocation does not wholly differentiate this kind of a trust from all of those which work a forbidden suspension of the right of alienation.

§ 90. *The Nature of Perpetuities.*—Consideration of the rule against perpetuities shows that it concerned itself about limitations which postponed the vesting of property to a remote time, thereby causing undue restraint upon alienation. Thus it has been said: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."⁵ And a definition approved by the United States Supreme Court⁶ is as follows: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from alienating the fee of the property, discharged of such future use or estate, before the event is determined, or the period is arrived when such future use or estate is to arise."⁷ Thereupon the court said: "It is then a limitation upon the *jus*

⁴Young v. Snow (1897), 167 Mass. 287, 45 N. E. 686.

⁵Gray on Perpetuities (2nd Ed.), sec. 201.

⁶Perin v. Carey (1860), 65 U. S. (24 How.) 1. c. 494.

⁷Sander's Essay upon Uses and Trusts, 196.

disponendi of property, upon the common law right of every man to dispose of his land to any other private man at his own discretion." These descriptions show that a perpetuity affects in no way a vested interest, because "*ex vi termini* it is not subject to a condition precedent,"⁸ and it does not matter that such an interest may not give a right to the possession, as for example a remainder or reversion, where no contingency may prevent a future right of possession."⁹

Inasmuch as these business trusts reserve to *cestuis que trust* the entire equitable interest in property, immediately vesting by the terms of instruments creating them, and there are no limitations as to any future interest or estate to arise upon some condition precedent, it would seem impossible for such a trust to be declared void under any rule against perpetuities. Therefore, it will be inquired whether such a trust may be unlawful as suspending the right of alienation. Such suspension has been spoken of inaccurately as a perpetuity, but as no perpetuity is forbidden that does not operate as a suspension of the right of alienation during a prescribed period, it is sufficient to inquire wherein these trusts may contravene any rule of law against restraints upon alienation. This inquiry will relate to no question of a future estate, except incidentally, as none by these trusts is contemplated.

§ 91. *Suspension of the Right of Alienation.*—Restraint upon alienation is a part of, or inheres in, the rule against perpetuities, but it is not sufficient alone to raise application of the rule. Thus Mr. Gray says it is a "mistaken idea that a trust violates the Rule against Perpetuities because it is to last indefinitely."¹⁰ Nevertheless, a trust, if it effects or may effect an absolute suspension of the right of alienation beyond a prescribed period, would seem to be contrary to American statutes, and, possibly, to the spirit of American decision, whether it could be deemed

⁸Gray on Perpetuities, (2nd Ed.) Sec. 205.

⁹Vanderpool v. Loew (1889), 112 N. Y. 167; Seaver v. Fitzgerald (1886), 141 Mass. 401.

¹⁰Gray on Perpetuities (2nd Ed.), Sec. 412.

opposed to the strict rule against perpetuities or not. At all events, it is from this aspect and out of an abundance of caution, that these trusts will be treated in this chapter, for it is certain, that, if a trust agreement does not work an undue restraint upon alienation, it cannot offend the rule against perpetuities. Employing the words of Mr. A. C. Freeman in a very elaborate note on perpetuities,¹¹ it will be inquired whether the "terms of a trust are such, that in the performance of the duties confided to them, the trustees may be required to hold the title, without the power of alienation on their part, beyond that permitted by the statute of the state forbidding any disposition of property which may restrain the power of alienation beyond the time designated therein," and additionally if the trustees are so required, for example, by a testamentary trust, if the statute would apply where settlors, making themselves owners of the entire equitable interest, may alter such requirement.

That a testamentary trust can be made to continue for a definite period, beyond the time when all interests are vested, by the mere fiat of a testator and against the joint act of trustees and beneficiaries seeking to terminate it, has been held by the Supreme Judicial Court of Massachusetts.¹² But it scarcely is to be doubted, that the creator of a trust may, with the consent of all interested therein, change its terms. If he may, a requirement therein that trustees have no power of alienation, is not conclusive of an absolute suspension thereof.

§ 92. *Suspension of Power of Alienation Must be Absolute.*—A very interesting case of a trust organized "to last indefinitely," using the language of Mr. Gray, and which was held not to cause even a suspension of the power of alienation was decided by the Illinois Supreme Court.¹³ This trust in land was organized for the sole benefit of its creators and assignees to whom they might convey their separate equitable interests, represented by shares in the capital stock of the trust. The court said: "The land was to be conveyed to the trustees to be

¹¹49 Am. St. Rep. 129.

¹²*Young v. Snow, supra.*

¹³*Hart v. Seymour (1893), 147 Ill. 598, 35 N. E. 246.*

subdivided and improved and then sold, and the time of sale was left wholly to their discretion. Indeed the whole scheme of the association was to purchase, sub-divide and improve suburban property for the purpose of placing it at once upon the market for sale. No trust term was created and a conveyance of the land or any part of it at any time was no violation of the trust. Where there are persons in being at the creation of an estate, capable of conveying an immediate and absolute estate in fee in possession, there is no suspension of the power of alienation, and no question as to perpetuities can arise." It was unnecessary for the court to say that even had the trustees been required to hold the title indefinitely, this could have been changed by all parties in interest and who were themselves creators of the trust, because the trustees were granted by the trust, a power which prevented there being any suspension of the power of alienation. In a Massachusetts case¹⁴ there was a trust without a trust term and with no power in the trustees except as directed by the directors of an unincorporated association to sell. The court said: "Such a trust for the convenience of an unincorporated association in renting and selling land, under which the land is held for no other purpose, and where the income is not accumulated but is distributed as it accrues and where the land is to be sold free of trusts at the will of the association, and where the whole equitable interest in the trust is at every moment vested absolutely in those who at that moment are shareholders, and never can become vested in any other persons save by act of the absolute owners or by operation of law upon their property, and not by force of any limitation contained in the deed of trust, the equitable interests so vested being also constantly vendible by their several owners without let or hindrance, as well as subject to their debts and passing like other property upon death by virtue not of the deed of trust, but of the general laws governing the disposition of property of decedents, withdraws no property from commerce, and is not within the reason or terms of what is called the rule against perpetuities."

¹⁴Howe v. Morse (1899), 174 Mass. 491, 55 N. E. 213.

It is to be said that Massachusetts has no statute modifying this rule, but even if it had and it merely condemned suspension of the power of alienation, without reference to any future limitation as to vesting, this trust would not have been condemned, because it was said that it "withdraws no property from commerce."

While the point is not material with respect to suspension statutes, yet the claim of perpetuity made in the case because of transferability of shares is convenient to be noticed, so far as what this court said on the point. It said: "The provisions by which the trust fund may be at some time held for the benefit of persons not shareholders at its inception, and who may become such, at a period more remote than that allowed by the rule, are not future limitations made by the trust deed in the sense in which the word 'limitation' is used in speaking of the operation of the rule. If there shall ever be a shareholder other than those in whom the whole equitable estate was absolutely vested at the inception of the trust, that shareholder will not take his interest by virtue of a limitation in the trust deed, but because of his succession by virtue of the general principles of law to the property of the original shareholder. * * * The entire ownership is never for a moment uncertain nor unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to his creditor by the ordinary process of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest." It seems too plain for argument that the possessors of "the entire ownership" could terminate such a trust at any moment, whether there were a trust term stated or not, and this language is significant in view of what the court said in *Young v. Snow*, *supra*, where there was a testamentary trust. The author of that trust had commissioned no one to shorten the term he had prescribed. The point was also made, that as no direction could be given for a sale by the trustees except by a three-fourths vote of the shareholders this made a possible title continue in the trustees beyond a term allowed by law, as had been held in a prior case by this court.¹⁵

¹⁵Winsor v. Mills (1892), 157 Mass. 362, 32 N. E. 352.

But the court distinguished the two cases as follows: "The provision in the present trust, that the shareholders are not to have any interest or title in the trust property itself and no right to call for partition, and that the share shall be personal property, is not a restraint upon alienation, since the alienation of the legal and equitable ownerships are provided for. It does not appear, and cannot be assumed, that the persons who organized the association and became its shareholders had title to the land held by the trustees. Their whole interest comes through the shares which are vendible without restraint. In *Winsor v. Mills*, Philbrick, who held the title, owned two undivided thirds of the land and held the remaining undivided third in trust for Mills, under an explicit agreement that no sale or conveyance of the land, or of any part thereof, or any interest therein, should be made by Philbrick, his heirs or assigns, except upon the written consent of Mills, his heirs or assigns; and there was also a provision by which a part of the land might be purchased by Mills or his heirs or assigns at a specified price, at any time before the land should be otherwise sold or disposed of. These were restraints upon alienation, and were held void because they might continue too long. The purpose of the trust was to prevent alienation of the land and to keep it out of commerce. Neither of the owners could convey his own share in the property and the land was intentionally tied up."

It was claimed in the *Winsor* case that the rule against perpetuities only applied where it was impossible for the owners of the estate to convey it, but the court said this was not accurate in reference to many cases which come within the rule, and it would not apply it to a case where land is to be held in fee simple, but to be "inalienable so long as a certain other estate remains the property of the owner and his descendants." In other words, this would be to recognize the existence of a condition precedent to the right to convey a fee simple title, a condition intentionally withholding such a title from commerce.

In New York where unlawful suspension may accrue by reason of a trust-term, with no power of alienation while the trust existed, if the term exceeded or might exceed the prescribed

period, the court said:¹⁶ "The mere creation of a trust does not, *ipso facto*, suspend the power of alienation. It is only suspended by such a trust, where a trust-term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee, or in consequence of a discretion reposed in him by the creator of the trust. The statute of perpetuities (N. B. the court calls this a statute of perpetuities, though it is not strictly such, but only a statute against restraints upon alienation) is pointed only to the suspension of the *power* of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason that the trustees are persons in being who can at any time convey an absolute fee in possession." The observation the court makes about interest of beneficiaries being inalienable can, of course, have no application to interests in trusts this book is considering, as we have shown that a settlor cannot thus provide for himself against his creditors and by the trusts themselves shares are transferable. But the strength of the court's ruling is emphasized by such a remark.

In a later New York case¹⁷ expressly approving *Roberts v. Corning*, *supra*, a residuary estate was held not subject to the perpetuities statute upon the following reasoning: "The payment of the bequest of the residuary estate to the trustees in Scotland was to be made by the executors as soon and when the same was converted into money. The fact that such conversion might require a period of time not measured by lives

¹⁶*Roberts v. Corning* (1882), 89 N. Y. 225.

¹⁷*Hope v. Brewer* (1892), 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458.

does not create an unlawful perpetuity. * * * It was within the legal power of the executors to convert the whole estate into money the day after their appointment and qualification, and to pay over the residuary fund to the foreign trustees, and this fact would seem to constitute a sufficient answer to the contention that the absolute ownership was suspended, by any reason of any power or duty conferred upon the executors."

Where there was a provision in a will that the executor should not be compelled to make partition, division and apportionment, until after five years from the probate of the will where, as in New York, suspension is measured by lives, this was held not objectionable, because "the power of sale was not suspended. He could sell and convey an absolute fee in possession at any time after the testator's death."¹⁸

§ 92b. *No Suspension Where Settlers Are Sole Cestuis.*—As showing that it is only where a trust is created in favor of another or others than where the trustor or settlor is the sole beneficiary, that the instrument must alone be looked to, to ascertain whether there is an absolute suspension of the power of alienation, a decision by New York Supreme Court seems very pertinent.¹⁹ In that case it was claimed that a deed of trust reserving the income to the trustor for life with a power of appointment by will to say where it should then go, there was a violation of the rule against perpetuities. It was said: "It may be gravely doubted whether that deed of trust imposed a single fetter upon the hand of the testator to write such a will as he saw fit. He was not executing a power of appointment given to him by another. His was not an act which derived its force from any delegated authority. * * * It is difficult to imagine who could object to that testator's conveying absolutely the property referred to in the trust instrument during life * * * notwithstanding the trust deed. After that deed of trust was delivered the vital ownership of the income and the

¹⁸Henderson v. Henderson (1889), 113 N. Y. 1, 20 N. E. 814.

¹⁹United States Trust Co. v. Chauncey (1900), 66 N. Y. Supp. 563, 32 Misc. Rep. 358.

property itself remained in the trustor." This as to a single settlor or trustor seems to show there can be no absolute suspension of the power of alienation where "the vital ownership of the income and the property itself remains in the trustor," and every word would seem applicable to several trustors who may act in unison.

In a decision by the New York Court of Appeals²⁰ it was said, where a like reservation was made in a deed of trust: "He reserved therein the beneficial interest during his life and a power of appointment by will. This was little less than ownership."

But another New York case²¹ gives yet stronger expression to the principle indicated by the New York Court of Appeals in the Livingston case, *supra*. Thus a trustor transferred all of his property to a trustee to manage and pay trustor the income for life and at death transfer it to such persons as he should by will appoint. It was claimed that the will and the deed taken together violated the rule against perpetuities, though standing alone neither would. If the deed was irrevocable it was conceded that the two must be taken together. The court said:²² "*It is not true that the trust was irrevocable. It is only in cases where other parties besides the person creating the trust have an interest therein that the trust becomes irrevocable.* We see nothing that would have prevented the deceased from revoking the trust if he had desired to do so. No one had any interest to prevent his doing so." Therefore it was held that there was no term whatever created by the trust deed, which could be taken into account upon the question of there being or not any suspension of the power of alienation under the New York perpetuities statute, as it is familiarly called, notwithstanding that on the face of the trust deed there was a trust term specified.

²⁰N. Y. L. Ins. & T. Co. v. Livingston (1892), 133 N. Y. 125, 30 N. E. 724.

²¹Re. Ogsbury (1896), 39 N. Y. Suppl. 978, 7 App. Div. 71.

²²Italics are by the author.

The cases from New York last above cited refer to a single settlor or trustor and it is asserted that in principle they apply to more than one trustor. Happily this point has been directly passed upon by New York Court of Appeals.²³ There the court said: "If there is a present right to dispose of the entire interest, even if its exercise depends upon the consent of many persons, there is no unlawful suspension of the power of alienation."

Infancy of beneficiaries has been held to have no effect on the question of there being or not an unlawful suspension of alienation.²⁴ The court said in the case just cited: "I have treated this just as if all the children were adults at the death of their mother, as the statute is aimed only at the suspension of the power of alienation by the terms of the instrument, and not such as necessarily arises from the disability of infancy, or from other causes outside of the instrument." But if an instrument is revocable by adults, as shown in *re. Ogsbury, supra*, so as not to be capable, whatever its terms, of creating an unlawful suspension of the power of alienation, it also should be thus regarded as to infants, or the law will treat the shield of personal privilege in their favor as a sword against them.

In Wisconsin it was said as to a testamentary trust, which was of indefinite duration, that the power of alienation was not unduly suspended both because the trustee could sell at any time, and, the will containing no prohibition, express or implied, against terminating it, there were parties in being who could by uniting cause its termination, when they became *sui juris*,²⁵ thus very plainly declaring that any necessary postponement arising out of infancy is not to be considered, when there would otherwise be in existence those capable of conveying a fee in possession, so far as the question of undue restraint of trade is concerned.

²³*Williams v. Montgomery* (1896), 148 N. Y. 519, 1. c. 526, 43 N. E. 57.

²⁴*Beardsley v. Hotchkiss* (1884), 96 N. Y. 201, 214.

²⁵*Holmes v. Walter* (1903), 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986.

§ 93. *Power of Sale With Directions to Reinvest.*—It is believed to be well established that, though a trust instrument may authorize a sale by trustees, yet, if the proceeds of sale are to be reinvested upon the same uses and trusts, the theory of undue restraint of trade will be applied. It is clear that this would not take a devise or legacy out of the rule against perpetuities, though it may be conceivable that such a provision in a trust might be thought not to offend a rule against suspension of alienation. It could be urged, in the latter case, that the property of the trust was not thereby withdrawn from commerce, and investment and reinvestment, over and over again, keeps it in commerce. Especially might this contention seem forceful as to a business trust for divers reasons, chief among which is that the very purpose of the trust is not to withdraw property from, but to embark it in, commerce. Additionally there is the fact, as shown by decisions, *supra*, that the trust itself is at all times revocable and parties are at every moment of its existence, capable of conveying absolute title to any purchaser. It is unnecessary to discuss the cases on the question of reinvestment, as none is of a trust for the trustor's sole benefit, and it should be frankly conceded, that, if this kind of a trust may create an absolute suspension of alienation, despite the principles in the cases we have cited, the mere suggestion above made must be considered upon its merits or the lack thereof, there being no authority found on the precise point.

§ 94. *Directions for Accumulation.*—It is difficult to understand how a trust *inter vivos* devoting property to a gainful pursuit could come under the description of a trust for accumulation, even though it provided for its profits being added to capital in conformance with requirements of the business or in the discretion of the trustees reserved as surplus, out of an abundance of caution. All such arrangements amount, at most, to an increase of capital to be employed in the same way that the original capital was at first employed. If the shareholders are the sole owners of equitable interests and virtually of the capital itself, by agreement they may increase or diminish it at their pleasure. It is trust property, but it is not *corpus* in the

same sense as in an ordinary testamentary trust. Cases regarding *corpus* and its accumulated rents and profits to be held for a definite period or upon the arising of some future event, are of trusts not for the exclusive benefit of settlors, but where the accumulation provisions are integral, irrevocable conditions or limitations upon the trust.

This view as to accumulation of profits receives support from a decision by the New York Court of Appeals,²⁶ wherein it appears that testator had provided in his will as follows: "I direct that my executors hereinafter named, or such of those named as shall qualify as such, their survivors or successors, shall prosecute or carry on with my estate or property, my present business under the firm name of Garner & Co., for and during the lifetime of my wife, Mary Marcellite, and my daughter Florence, and the survivors of them, and all profits and gains arising from said business shall, after the sums set apart for the support of my wife and children, as hereinafter provided are deducted, be added to and form a part of the working capital of my estate." The business was conducted as directed, and consisted in the manufacturing and selling of cotton goods on a very large scale. The case here under consideration came up as a result of an accounting in which the daughters claimed \$3,748,314.84, as having been illegally added to working capital from the surplus profits and gains of the business. The New York statutes provide that directions for accumulation of income, in whatever form, from real, or personal property are only permissible when made for the benefit of minors and for the duration of their minority. The court in a unanimous opinion held that, although trustees in the management of a business may apply "earnings from the business to the perfecting of its earning capacity, or to its protection in various ways, and the action of the trustees in doing so, if seen to have been a reasonable exercise of discretion, would be sustained by the Courts," still an absolute direction to accumulate without reference to business needs offended the New York statute and rendered the direction to accumulate void. However, as the par-

²⁶Thorn v. De Breteuil (1904), 179 N. Y. 64, 71 N. E. 470.

ties in interest had assented to various previous accountings wherein "the aggregate of the profits and gains had been added to the capital of the estate," they were estopped from afterwards setting up a claim to them as constituting illegally withheld income.

§ 95. *Lawful Period of Suspension of Alienation.*—It has been thought advisable to consider whether upon principle such a trust as this work is concerned with could be deemed, even when not specifying a trust-term, to work an unlawful suspension of the right of alienation. This assists to a clearer understanding of the nature of such a trust and to differentiate it from one in which *cestuis que trust* have, as said by Lord Cairns, *supra*,^{26a} "limited interests", and not where "the equitable interest has become entire and complete without any limit." Then, too, it is found, that abundance of caution, if nothing else, has suggested to trustors with entire and complete equitable interests, without any limit, to fix a term for the duration of a trust agreement. This is an easy requirement where lawful suspension is not measured by a life or lives in being, but it is not so easy where such is the measurement of duration. Nevertheless, even that measurement admits of practicable employment, conceding, for the sake of argument, that a trust-term should be stated.

In a Wisconsin case where there was a suspension of alienation for the expressed period of twenty-one years, and there was a statute prohibiting suspension "for a longer period than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter," the court ruled the suspension was lawful. It said: "To say that twenty-one years can be a longer period than the continuance of two lives and twenty-one years is to assert that one of its parts can be greater than the whole, the falsity of which is axiomatic in law, as in mathematics."²⁷ The lawfulness of such a

^{26a} § 89, *ante*.

²⁷In *re. Will of Kopmeier* (1902), 113 Wis. 233, 89 N. W. 1134.

suspension, where such period was similarly measured, is strikingly illustrated in a decision by the U. S. Supreme Court.²⁸ There a will required that the estate should be held in trust by the executors for twenty years before final division among four children and that the share devised to his daughter should then be conveyed to three trustees with the net income to be paid to her for life with the principal after her death to her children or *appointees*.²⁹ The court said: "To the suggestion that the will violated the rule against perpetuities, which prohibits the tying up of property beyond a life or lives in being and twenty-one years afterwards, it is a sufficient answer that after twenty years from the death of the testator, and after the death of the widow and daughter, (if not before) the title, legal and equitable, in the whole estate would be vested in persons capable of conveying it." Thus again it is seen that there is no suspension where there is a right to convey. This will contemplated the tacking of one trust estate upon another to run for longer than twenty years, the period being indefinite, but as there arose upon the expiration of twenty years the power of alienation, the tacking was merely contemplated and not absolutely enjoined.

As to states where statutory modification has measured lawful suspension from alienation by a life or lives it is premised that the only cases which authority supplies are where trust instruments are irrevocable trust instruments imposing conditions upon other beneficiaries than the settlors or trustors themselves. But considering for the sake of argument and despite decision *supra*, that no trust is irrevocable except "in cases where other parties besides the person creating the trust have an interest therein," it will be attempted to show how in an agreement for a trust to carry on business, in these states, a practicable trust-term may be provided for. At once settlors in such an attempt are confronted with the prohibition against creating any suspension for an absolute period without reference to any lives. Thus where a "testator intended that his

²⁸Potter v. Couch (1890), 141 U. S. 296, 314, 11 S. Ct. Rep. 1005, 35 L. Ed. 721.

²⁹Italics by author.

residuary estate should remain in the hands of his executors for the simple purpose of accumulation for the period of ten years after his death," the court said: "The trust is not made determinable with or within any two ascertained lives, nor is it limited by life, but during the whole of that fixed term the estate is inalienable."³⁰ This was held to be a prohibited suspension, and the residuary clause void.

Neither may suspension be measured by any greater number of lives in being at the creation of a trust than the statute directs. Thus where the measure was no longer than during two lives in being at the creation of the estate, a suspension to continue until the death of four designated persons was held to be unlawful,³¹ and so where the principal of a bequest was to vest after the death of three designated persons.³²

In the last two cases it appears that the suspension was necessarily to continue beyond the statutory periods while in *Rice v. Barrett*, *supra*, it might, but not necessarily would, but a fixed period however brief equally offended the statute. The suspension must not be measured in any other way than prescribed. But a period of time may be provisionally stated. Thus where a trust was to continue until grantor's youngest child then living should attain twenty-one years of age, provided this was in the life time of two designated persons, otherwise to cease at their death, it was ruled there could be no possibility of the trust continuing beyond the duration of two designated lives and it was therefore a lawful suspension.³³ And this period may also be expressed in years unless sooner terminated by the deaths of the designated persons.³⁴ Thus a will was sustained which provided for a trust for twenty-five

³⁰*Rice v. Barrett* (1886), 102 N. Y. 161, 164; 6 N. E. 39.

³¹*Leavitt v. Wolcott* (1884), 95 N. Y. 212, 218.

³²*Shipman v. Rollins* (1885), 98 N. Y. 311.

³³*Levy v. Hart* (1869), 54 Barb. (N. Y.) 248.

³⁴*Simpson v. Cook* (1877), 24 Minn. 180; *Phelps' Exr. v. Pond* (1861), 23 N. Y. 69.

years, except that if death occurred before that the estate should be distributed.³⁵

In New York, Michigan and Minnesota the period of suspension is measured by two lives in being at the creation of an estate, the two latter states adopting the New York statute and presumably therefore with construction already placed thereon. Wisconsin, up to 1887, had the same statute, but in 1887 the words "and twenty-one years thereafter" were added.

The only other states measuring the term of lawful suspension by "lives in being at the creation of the estate" are California, Idaho, Indiana, North Dakota and South Dakota, whose statutes differ from the New York statute in putting no restriction upon the number of lives. In all other states there is an absolute period of at least twenty-one years beyond a life or lives in being.

It is also to be said that construction at one time was that designation by lives must be among those of the beneficiaries.³⁶ But this holding was expressly disapproved, in one case where duration was predicated on the life of the trustee,³⁷ and in another case, on the lives of two persons who were strangers to the trust.³⁸

§ 96. *Provisions for Continuance Beyond Stated Trust Term.*—As to providing for a continuance of the trust to a time beyond the trust term provided for in the trust instrument, by a course prescribed by that instrument, it is to be considered, whether such provision could or might offend the rule against restraints upon alienation. Thus suppose, that the power to continue should be confided to the discretion of the trustees or be left to be decided by a certain proportion less than the whole of the *cestuis*. It would seem clear that, if the trustees or, for that matter, any person not a beneficiary were given this un-

³⁵Oxley v. Lane (1866), 35 N. Y. 340.

³⁶Downing v. Marshall (1861), 23 N. Y. 366.

³⁷Crooke v. County of Kings (1884), 97 N. Y. 421.

³⁸Bailey v. Bailey (1884), 97 N. Y. 460.

restrained power, this would be an evasion of the rule against perpetuities. But as trustees should not control the *cestuis* in this regard, why should any number of *cestuis* less than the whole control those who do not assent to a continuance? But it may be said, that the rule against suspension of alienation does not apply, because there is no suspension of the absolute power of alienation for reasons shown *supra*, and this power remains as well after as before the trust is continued. This would seem to be a good answer, but whenever it is deemed advisable, out of caution, to state a term and to state that in accordance with statute prescribing a lawful period regarding suspension of alienation, the same caution would recommend that neither all nor any of the original *cestuis* nor their transferees should be committed to any attempt at evasion of such a statute.

§97. *Rule Where Restraint is Upon Partition.*—Another reason why this rule against restraints upon alienation does not apply to these trusts may lie in the fact that interests are represented by transferable shares, the holders of which can call for no right of partition and “a prohibition against partition is not a restraint on alienation, as the undivided share is always assignable.”³⁹ Therefore if the trust does not offend against the rule against restraints upon alienation, such a provision for continuance from a new date whatever its terms would seem to be valid. But, if any doubt exists about this rule applying, it were safer not to provide for a continuance of the trust in the absence of consent by all shareholders, or without non-assenting ones having the option to surrender their shares upon a valuation to be made as may be prescribed.

§ 98. *Summary.*—From the cases hereinbefore cited and discussed it appears reasonably certain that a trust with no limitations or conditions upon the vesting of a future estate can by no sort of construction be called a perpetuity; that where it does not suspend the absolute power of alienation during a forbidden period it comes under no statutory modification of

³⁹Gray on Restraints on Alienation (1883), Sec. 30; Gray on Perpetuities (2nd Ed.) (1906), Sec. 509 *l*; *Howe v. Morse* (1899), 174 Mass. 491, 55 N. E. 213.

the rule against perpetuities; that where no one other than the holders of transferable shares in a business trust have any interest therein the trust is revocable and at all times there are owners in possession who can convey and thus there is no absolute suspension of the power of alienation; that as to the rule in nearly all of the states an absolute period of suspension of at least twenty-one years is lawful, whatever may be thought in regard to these business trusts; that a provisional period of time may be fixed where the absolute duration is measured by lives.

CHAPTER XIV.

ACTIONS BY AND AGAINST THE TRUSTEES.

§ 99. *Trustee of an Active Trust a Principal and not an Agent.*—For the proper presentation of the subject of this chapter the individuality of a trustee, and where there is more than one, the trustees, of a business trust may be dwelt upon. In doing this recurrence to citation of cases already referred to will arise along with citation of other cases. Thus in *Taylor v. Davis*,¹ Mr. Justice Woods says the trustee “is a principal and not an agent,” and as “a trust cannot contract, if the trustee is not bound, then nobody is bound,” recognizing, however, that if he chooses he may exempt himself and subject the trust property to liability for his contracts.²

The personality of a trustee, as distinguished from his representative character, was early recognized, as a principle, in our jurisprudence. Thus, Mr. Justice Field in *Pennoyer v. Neff*³ relied upon *Massie v. Watts*⁴ and other cases for the proposition that the state through its tribunals may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, proper instruments of transfer according to the *lex rei sitae*. Thus, in the case relied on the Chief Justice said: “Where the defendant is liable to plaintiff, either in consequence of contract, or as *trustee*, or as the holder of a legal title acquired by any

¹(1883), 110 U. S. 330. See also *Mason v. Pomeroy* (1890), 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771; *Connally v. Lyons* (1891), 82 Tex. 664, 18 S. W. 799, 27 Am. St. Rep. 935.

²See also *Shoe and Leather Bank v. Dix* (1877) 123 Mass. 148; *Bank of Topeka v. Eaton* (1900), 100 Fed. 8; *Hussey v. Arnold* (1904) 185 Mass. 202, 70 N. E. 87.

³(1877) 95 U. S. 714.

⁴(1810) 10 U. S. (6 Cranch) 148.

species of *mala fides* practiced on the plaintiff, the principles of equity gave a court jurisdiction wherever the person may be found," and: "Upon the authority of these (cited) cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion, that in a case of fraud, *of trust* or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although land not within the jurisdiction of that court may be affected by the decree."

Again it has been held that a trustee is a person, in the same way that a natural person is distinguished from a corporation, under the Federal Constitution.⁵ Thus, in the first of the cases cited in the note, Gresham, C. J., said: "It will be observed that this (Indiana) Statute does not prohibit foreign corporations from doing business in this state. Obviously that was not the design of the legislature. It is a statute which denies to residents of other states the right to take and hold *in trust*, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations or corporations, within or without the state, power to convey to any person in trust not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states."

Still further decision as to jurisdiction of federal courts in diversity of citizenship exemplify the personal, as opposed to the representative, capacity of trustees. Thus it was ruled that a federal court obtains jurisdiction through the trustee, though the beneficiary may be of the same state as the defendant, where the suit is brought.⁶ This rule extends even to a

⁵Farmers' Loan & T. Co. v. Chicago & A. Ry. Co. (1886), 27 Fed. 146, 149. See also Shirk v. La Fayette (1892), 52 Fed. 855; Roby v. Smith (1891), 131 Ind. 342, 30 N. E. 1093.

⁶Dodge v. Tulleys (1892), 144 U. S. 451, 456; 12 S. Ct. Rep. 728, 36 L. Ed. 501. See also Peper v. Fordyce (1886), 119 U. S. 469, 7 S. Ct. Rep. 287, 30 L. Ed. 435; Coal Co. v. Blatchford (1870), 73 U. S. (11 Wall.) 172, 20 L. Ed. 179.

case where a beneficiary, with the requisite diversity, sues instead of a trustee, who is without such diversity, jurisdiction for this reason being denied.⁷ It is also held that the rule of there being or not jurisdiction in all of the plaintiffs or in all of the defendants being qualified applies in the same way to trustees as to others.⁸ It was also ruled that the trustee of an active trust made so by the act of the parties creating the trust is not a formal or nominal party.⁹

The fact of personal capacity being of controlling influence was recognized by the Supreme Court of Mississippi where it announced the general rule expressed in *Taylor v. Davis*, *supra*, and then said: "But while this is the rule, there are exceptions to it, and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been, if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or non-resident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in Chancery."¹⁰ This is really, if not quite equivalent to, saying that an attachment might be sued out for non-residence, the only obstacle to such announcement being that it is necessary to proceed in equity to subject trust property to a debt created by a trustee. Where statute may provide that it may be reached by an action at law, it would seem certain that process by attachment, upon the ground of non-residence of trustee, would lie, at least, if he by himself or agent, were in control and management of trust property in the jurisdiction.

District of Columbia Court of Appeals shows that a trustee is not a mere officer, like an executor or administrator to be

⁷*Shipp v. Williams* (1894), 62 Fed. 4, 10 C. C. A. 247.

⁸*Coal Co. v. Blatchford* and *Shipp v. Williams supra*.

⁹*Shipp v. Williams supra*; *Knapp v. Railroad Co.* (1873), 87 U. S. (20 Wall.) 117, 22 L. Ed. 328.

¹⁰*Norton v. Phelps* (1877), 54 Miss. 467, 471.

called to account in the jurisdiction where he is appointed but he may be sued in whatsoever jurisdiction he may be found.¹¹ In this case the defendant was a resident of Fairfax County, Virginia, by the court of which he was appointed executor. The suit was to recover a legacy and was brought in the Supreme Court of the District of Columbia, where personal service was obtained. The court said: "This is not a suit for the settlement of the estate. There is no controversy as regards the executor's account. There does not appear to be any question of the right of any creditor. Some sixteen years had elapsed since the probate of the will. From the statement of the terms of the will contained in the bill, it would appear that defendant Herbert stood in two relations to the testator: first as executor for all purposes of administration, and second as trustee for the benefit of legatees, after the estate shall be closed and until the death of Mary Johns. The lapse of time, the facts alleged in the bill, all go to show his assent to the trust created in him by the legacy. As a trustee of the legacy then, and not as executor of the estate, he is amenable to suits in the courts of any jurisdiction within which he may be found."

§ 100. *Necessary Parties Defendant in Actions Against Trustees.*—The characteristic and sufficiency of jurisdiction *in personam*, when trustees are sued, are further illustrated in cases, which hold that beneficiaries or *cestuis que trust* need not be joined as parties defendant, when actions are founded either upon contracts entered into, or for torts committed, by trustees.

The obligation of trustees, as said in the English case of *In re Frith* (1902), 1 Ch. D. 342, is such that "the creditor is entitled to sue all three or any two or any of them," there being three trustees of that trust, which was a boot manufacturing business. Selection of trustee defendants in this case was material as to the right of the creditor to avail himself of the trustee's right of indemnity, it appearing that one of said trustees was a defaulter. As trustees contract and the trust estate

¹¹*Johns v. Herbert* (1894), 2 App. D. C. 485, 497.

does not, the usual principles about joint and several obligors apply. If the trust estate is sought, statutes as to right of service by publication may be available.

Where liability is limited to the trust fund it would appear to the writer that the only safe procedure would be to make all the trustees defendants, unless the trust instrument specifically waives this, in order that title would pass upon judicial sale.

It has been held by some courts and stated by Dean Ames in his cases on Trusts, page 262, that in a foreclosure bill a trustee does not adequately represent assets, principally because the *cestuis* should have opportunity to tender the amount necessary to prevent foreclosure, but this seems merely an exception in the way of a choice by *cestuis* to preserve the estate by voluntary contributions.

§ 101. *Trustee Sued Alone Where Instrument Gives Trustee Full Control.*—Chief Justice Waite expresses the rule as to the necessity or not of joining beneficiaries, as follows: "It cannot be doubted that under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him as well as what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger or to one by a stranger against him to defeat it in whole or in part."¹²

One of the cases, which the Chief Justice cites as authority to this proposition, was where a creditor sought to reach trust property in the hands of trustees. After the action was commenced one of the beneficiaries asked to be made a party defendant, alleging collusion of the trustees with the plaintiff and that the former did not intend to make defence, for which affi-

¹²Kerrison v. Stewart (1876), 93 U. S. 155, 160.

davits were submitted. His application was denied. The court announced that: "The principle seems well-settled that in an action by a creditor to reach trust property, in the hands of administrators or trustees, who have the control of and whose duty it is to protect the property, the *cestuis que trust* need not be made parties. The defence of the trustees is their defence, and their presence in court is not necessary to the protection of their interests."¹³

In Florida the rule of beneficiaries not being necessary parties, where it is sought to reach the trust property in a direct proceeding, is stated by way of exception as follows: "The trust property cannot be reached except by a proceeding in Chancery to which the *cestuis que trust* must be made parties; unless in cases where the property has been bound by the trustees within the scope of their authority."¹⁴ Similarly has the rule been stated in Illinois where it was said: "The general equity rule is that all persons interested in the subject matter of a suit must be made parties in order that the decree may affect their rights, and this rule requires that in litigation had in respect to trust property, both the trustee and the *cestuis que trust* be made parties. There is an exception to this where the trust is an active one, imposing on the trustee the duty of receiving, controlling and working the trust fund for the benefit of the *cestuis que trust*."¹⁵

An illustration of the completeness of this principle, not only as a rule of practice, but also as a rule of right, is furnished by a North Carolina case.¹⁶ That case concerned the enforcement of a mechanics' lien against trust property. The trial court rendered personal judgment against the trustees, but refused to subject the property to the lien because the *cestuis que*

¹³Winslow v. Minn. & P. R. R. Co. (1860), 4 Minn. 313, 317; 77 Am. Dec 519. See also 4 Lawson's Rights, Remedies & Practice § 2023.

¹⁴Zehnbar v. Spillman (1889), 25 Fla. 591, 598.

¹⁵McGraw v. Bayard (1880), 96 Ill. 146, 152.

¹⁶Cheatham v. Rowland (1885), 92 N. C. 340.

trust had not been made parties. The Supreme Court held this error, because the trustees were "as legal owners in charge to manage and take care of the common property, not only in its preservation, but in its defence against unjust and unreasonable demands, from whatever source they may come." The court also said that this was so entirely true that the statute of limitations operating against them would also operate against *cestuis que trust* though they be infants or married women.¹⁷

Of course there is a conclusive reason for beneficiaries not being made parties, where merely a personal judgment is sought against a trustee. It may be observed, however, in passing, that this personal liability of the trustee is the specific reason given in a Texas case for beneficiaries not being necessary parties.¹⁸ The other cases above referred to in this chapter seem to prove, that power may be so vested, along with the legal title, in trustees, that even when it is sought to reach the trust property the only necessary parties defendant are the trustees, this being thought to be true especially where "*the cestuis que trustent* are so numerous and so constantly changing by death, removal, etc. beyond the jurisdiction."¹⁹ When we remember that the decisions cited and quoted from merely deduce their conclusions from the mere commission of management and control to trustees, *a fortiori* are such conclusions applicable, when the trust instrument provides in terms, that trustees conclusively may act so as to bind the trust property for all acts and contracts done and entered into in execution of powers vested in them.

§ 102. *Trustees as Plaintiffs*.—In principle it may be said that the cases already cited and quoted from in this chapter,

¹⁷For other cases of and regarding trustees of active trusts, see *Bushong v. Taylor* (1884), 82 Mo. 660, 670; *Lebeck v. Fort Wayne Bank* (1896), 115 Ala. 447, 453, 22 So. 75, 67 Am. St. Rep. 51; *Sanders v. Houston Guano Co.* (1899), 107 Ga. 49, 56, 32 S. E. 610.

¹⁸*Connally v. Lyons* (1891), 82 Tex. 664, 18 S. W. 799, 21 Am. St. Rep. 935.

¹⁹*Bushong v. Taylor*, *supra*, citing *Van Vetchen v. Terry*, 2 Johns, Ch. 197 and *Story's Eq. Pl.* §§ 148, 150, 207a.

and those referred to from the standpoint of personal liability, are applicable under this section, because the same general inquiry is at stake, viz: whether there are sufficient parties before the court for it to determine, conclusively, the subject matter in controversy. In addition, however, it may be said that:²⁰ "The modern codes which provide that actions shall be brought by the real party in interest, universally authorize trustees of express trusts to sue in their own names without joining the beneficiaries, as an exception to the rule," and for this statement very numerous cases from many states are cited. It is useless here to cite local statutes on this subject, but practitioners are referred respectively to their own codes. Such an exception may be thought to be expressed more out of abundance of caution than otherwise, for a legal owner ought to be considered, in a matter of pleading, as the real owner, and especially so when that legal owner has the same control over property to which he has the legal title as has the absolute owner. It is stated, therefore, as a principle that "the trustee and not the beneficiary is the proper party to sue at law upon contracts made with the trustee."²¹

§ 103. *Trustees Suing in Foreign Jurisdiction.*—The distinction between an appointee of a court, in that the powers vested in him must be exercised within the jurisdiction of the court appointing him, or at least within the state, and a trustee whose title is created by the owner of property has been thus stated: "Where the legal title of the trustee is created by the owner of the property, it would be respected, and the right of the trustee to enforce it be recognized everywhere. It would not be deemed material that the legal title was encumbered with a trust. The *jus disponendi* would be acknowledged and effect given to it, though, of course, any requirement of the local law

²⁰ 22 Ency. Pl. & Pr. 167.

²¹ 22 Encl. Plead. & Prac. 179; *Oelrichs v. Spain* (1872), 82 U. S. (15 Wall) 211, 21 L. Ed. 43; *Grady v. Ibach & Co.* (1891), 94 Ala. 152, 10 So. 287; *Morrow v. Morrow* (1905), 113 Mo. App. 444, 87 S. W. 590; *Western R. Co. v. Nolan* (1872), 48 N. Y. 513; *Lee v. Horton* (1877), 104 N. Y. 538, 11 N. E. 51.

as to formalities must be observed. Thus: if the title of the trustee is created by will, the will must be proved in the state where the suit is brought, according to the local law, to give effect to any title under it. So if the legal title be by deed, the deed must be proved according to the local law. In this regard the legal title of the trustee does not differ from any other legal title, and he can everywhere enforce that title by legal proceedings, the same as any other owner."²²

A New York case enforces the same general view as *Curtis v. Smith*, *supra*, though differing with it on a question of practice.²³ Thus, where it was held by the trial court, that a testamentary trustee under a foreign (Canadian) will had no legal capacity to sue in that state without the will were first admitted to probate in the state, the Court of Appeals overruling this view said: "The trustee could have maintained an action in the courts of this state to recover any of the trust property wrongfully detained here, or for the wrongful conversion of such property, or for damages thereto. Such an action would not have been in a representative capacity, but in his own right as the legal owner of the property. It might have been necessary for him, upon the trial of such an action, to have the will proven and put it in evidence for the purpose of showing his title, but it would not have been necessary for him to have the will admitted to probate in this state. * * * * * It is the general rule that he who is the legal owner of property may maintain an action wherever it may be for its recovery, or for damages for its conversion. * * * * * In such cases all owners stand upon the same footing. But the rule is somewhat modified when one sues in a representative capacity. Foreign executors and administrators cannot sue here for reasons of public policy."

Here there is again perceived the same distinction,²⁴ which sustained an action against a trustee, who was also an execu-

²²*Curtis v. Smith* (1869), 6 Blatchf. 537, 6 Fed. Cas. 3505.

²³*Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* (1890) 123 N. Y. 37, 25 N. E. 198.

²⁴§ 99 *ante*.

tor, in a jurisdiction where he was *found*. The personal, and not the representative, capacity for jurisdictional purposes, was recognized in both cases.

§ 104. *Constitutional Right of a Foreign Trustee to Sue in Another State*.—The several cases which are referred to²⁵ on diversity of citizenship seem to involve the conclusion that the right of a trustee to sue in another state is annexed to citizenship especially, also, those cases condemning an Indiana Statute as a “plain discrimination against the residents of other states,” for the reasons stated by Judge Gresham, *supra*.²⁵ But a very recent decision by the Federal Supreme Court brings into relief this question,²⁶ in a two-fold view.

In this case a receiver appointed by a Minnesota Court, with authority to sue stockholders of an insolvent corporation upon their double liability was held by Wisconsin courts not entitled there to sue, because such a liability was contrary to the public policy of Wisconsin. The primary question considered by the Federal Supreme Court was the effect of the faith and credit clause of the Constitution. In his reasoning to his conclusion reversing the Wisconsin courts for not giving effect to this clause Justice Van Devanter said, among other things: “Under this (Minnesota) statute as interpreted by the Supreme Court of the state, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a quasi assignee and representative of the creditors and when the order levying the assessment is made he becomes invested with the creditors’ right of action against the stockholders, and with full authority to enforce the same in any court of competent jurisdiction in the state or *elsewhere*.”²⁷

It might be enough merely to suggest that this receiver called by the court “a quasi assignee” could as appropriately have

²⁵§ 99 *ante*.

²⁶*Converse v. Hamilton* (1912), 224 U. S. 243, 32 Sup. Ct. Rep. 415.

²⁷See also *Bernheimer v. Converse* (1907), 206 U. S. 516, 534.

been called a trustee of the creditors, and this suggestion derives force from one of the cases²⁸ cited by Bernheimer v. Converse, *supra*, in which cited case it was said: "The statutory liability of stockholders is an asset of the insolvent bank, the title to which was in said receiver as a trust fund for the purpose of satisfying the claims of creditors." In another of those²⁹ cited cases, it was said of such a receiver that: "By interest of his official relation to the corporation and its creditors he is the owner of the legal title to their fund as a trustee for the creditors." The question of comity was considered in this case, but that has been eliminated by the Converse decision and none of any of the cases dispute the competency of the receiver as trustee to bring the proper action elsewhere. We suggest that no question of comity may be found which would attempt to deny the right of the legal owner of a right of action to sue, whatsoever it might say as to his cause of action, if constitutionally his privileges and immunities as a citizen may be invaded at all. At all events the Federal Supreme Court reversed the Wisconsin courts, when, if it had power for any reason to sustain their ruling to deny admission to its tribunals, it might have sustained it. Instead it said this "quasi assignee" or trustee could compel the Wisconsin courts to entertain his suit.³⁰

§ 105. *Trustee of Express Trust Distinguished from Statutory Trustee.*—It is stated in Cyc.³¹ that: "Strictly speaking, a trustee deriving his power from statute or judicial appointment cannot as of right, maintain an action in comity outside of the jurisdiction of his appointment, and the tendency of the courts in earlier times was to refuse to entertain such actions." How far this general statement is subject to qualification by reason of the force and effect of the faith

²⁸Howarth v. Angle (1900), 162 N. Y. 179, 186, 56 N. E. 489, 47 L. R. A. 725.

²⁹Howarth v. Lombard (1900), 175 Mass. 570, 579, 56 N. E. 888, 49 L. R. A. 301.

³⁰See also Glenn v. Soule (1884), 22 Fed. 417; Glenn v. Williams (1882), 60 Md. 93, 119.

³¹39 Cyc. 449.

and credit clause of the United States Constitution it would be merely academic here to inquire. It is only desired to further accentuate the fact that it is impliedly admitted in the above excerpt that a trustee of an express trust may "as of right" maintain an action in foreign courts. Thus in an early case³² an action was brought by a trustee in which he recovered. While the case was pending on appeal the trustee died and the question arose in whose name should the appeal be revived. The law of Alabama was, that death required the substitution of a new trustee, while in Georgia where the trust was created the common law was presumed to prevail and his personal representative would succeed him. It was said that law was confined to Georgia and a trustee should be appointed in Alabama, in whose name the appeal could be revived.

A California case held that as a matter of comity a statutory foreign trustee should be allowed to sue in its Courts, if the rights of domestic creditors were not interfered with,³³ a holding which if not overcome by the ruling in *Converse v. Hamilton*, *supra*, yet goes no further than as above expressed. It compares such trustees to "foreign receivers and like officers."

In a Washington case³⁴ we find the excerpt taken from *Cyc.* and the question was whether the plaintiff "as trustee" could maintain the action. It was held he could because of comity. It would appear from other cases, that it was doubtful whether plaintiff was a statutory trustee but he was so regarded. He is spoken of as an "officer" and he was appointed substitute trustee by the court. In *Glenn v. Williams*³⁵ a substituted trustee though the substitution be by decree of court, was regarded as standing like the original trustee, the decree operating like an appointment. It was upon this very distinction he was held

³²*McDougald's, Admr. v. Carey* (1862), 38 Ala. 320.

³³*Iowa & Cal. Land Co. v. Hoag* (1901), 132 Cal. 627, 64 Pac. 1073.

³⁴*Fidelity Ins. T. & S. D. Co. v. Nelson* (1902), 30 Wash. 340, 70 Pac. 961.

³⁵*Supra*.

to have the right to sue abroad. This, however, seems all obviated by the logic of the ruling in the Converse cases, the faith and credit clause putting a receiver who is "quasi assignee" in the position of a trustee appointed by the owner of property.

A very elaborate discussion of this comity rule is found in an Ohio case³⁶ and at bottom it goes upon the theory that a statute and an order of court having no extraterritorial operation, outside at least of the faith and credit clause, does not bind property elsewhere. If this is the true basis of appeal to comity, it is easily understood in what way a trustee under appointment of an owner of property needs no more of comity for bringing a suit abroad than an ordinary holder of a promissory note. One status is based on *jus disponendi*, the other on contract and in final analysis the two are the same, while a statutory assignee or trustee may take *in invitum*,³⁷ and the law of his title be local.

§ 106. *Action Where Trustee Merely Binds Trust Estate.*—Under the broad language of Chief Justice Waite we have quoted,³⁸ it cannot be seen, that there would be any difference of venue in personal jurisdiction, where a trustee stipulates for exemption from personal liability and where he does not. He may be sued alone without joining the *cestuis que trust*, in the one case as the other, because it is by virtue of his being invested with powers that he becomes, so to speak, their *alter ego*, their personal representative as a principal.

It might be that a court in its discretion might direct that a *cestui que trust* be brought in, because his personal interests might be affected, but failure to make him such in the first instance would not be jurisdictional. Thus in a trust not embarked in trade and subject to none of its vicissitudes, and the sole duty of the trustees was to set aside so much of testator's property as would produce a certain annual income and pay that over to the support and maintenance of testator's insane

³⁶Bank v. McLeod (1882), 38 Ohio St. 174.

³⁷Matter of Waite (1885), 99 N. Y. 433.

³⁸*Ante* § 101.

daughter, in a suit to subject the trust fund to money borrowed by the trustees, it was held that upon the case being remanded on a reversal, a guardian ad litem to represent her, would after the service upon her, be appointed, as her personal interests may be affected by the proceedings.³⁹

It is easily conceived, however, that this would be vastly different where a trust instrument expressly provides, that a trustee may exempt himself from personal liability and is given the power to bind directly the assets of a trust for his acts and contracts.

§ 107. *Actions by Cestuis Que Trust.*—In actions by *cestuis que trust* against trustees for breach of trust the personal, instead of the representative, character of the trustee again appears. Thus it has been ruled, that if several trustees are implicated in a common breach of trust, for which a *cestui que trust* seeks relief in equity, he may sue all or any one or more of them, at his election.⁴⁰

Blatchford, D. J., said this was a well settled rule and was upon the theory of a tort being treated as several as well as joint. This was called an exception to the general rule that in a proceeding against trustees all must be made parties.⁴¹ We have indicated hereinbefore the liability of trustees to *cestuis que trust* and under what circumstances they may be sued at law.⁴²

§ 108. *Conclusion.*—There are many cases, which might have been cited and discussed were this a more general treatise

³⁹King v. Stowell (1912), (Mass.) 98 N. E. 91.

⁴⁰Heath v. Erie Ry. Co. (1871), 8 Blatchf. 347, Fed. Cas. 6306; See Holmes v. McDonald (1907), 226 Ill. 169, 80 N. E. 714, where only some of the trustees were sued.

⁴¹Cunningham v. Pell (1836), 5 Paige (N. Y.) 607. It has been said that all trustees should be joined so as to adjust liabilities of co-trustees and to avoid future litigation. Hutchinson v. Ayres (1886), 117 Ill. 558, 7 N. E. 476.

⁴²Ante § 85.

in regard to trusts. As, however, it is of a particular character of trusts, it has been endeavored to consider only such as may seem to bear some relationship or furnish some analogy to questions that may concern these particular trusts. That the remedy at law should more generally apply to them than other trusts may be readily thought, because the personality of the trustee in these trusts stands out in greater relief, and his status as that of general owner is more strongly emphasized, and then the rule of convenience, arising out of the similitude of trust interests, represented by transferable certificates, to those in a corporation, implies it was never intended, that any others than trustees need be made parties in law or equity, unless at least the integrity of a trust itself is threatened.

CHAPTER XV.

TAXATION.

§ 109. *Preliminary.*—It has been demonstrated, it is here assumed, that interests in a trust are subject to levy and sale, and assignable at the will of the owner, generally speaking, and especially so, when by the instrument creating the trust such interests are represented by transferable shares. It becomes, therefore, needful to inquire how a business carried on by means of a trust agreement stands, in comparison with other arrangements for the conduct of business, so far as the assessment of taxes are concerned. The federal corporation tax, resting upon the exercise of a privilege should be taken out of the review proposed to be made of the general subject of taxation, so far as needed in its particular bearing on trust estates and their beneficiaries. It needs to be noticed, however, by way of demonstrating that a business trust has at least one important consideration in its favor as compared with a corporation.

§ 110. *Excise Taxes.—Exemption of Trusts From Federal Corporation Tax.*—This part of the subject of this chapter briefly may be covered by allusion to and quotation from the corporation tax decisions. Two cases were disposed of by one of these decisions.¹ One of these was of a so-called “real estate trust.” By the instrument creating it trustees were vested with the title to certain lands and buildings in Boston, with absolute control and authority over same, with right to sell for cash or credit and to manage for the best interest of shareholders. Dividends were to be paid from income or net proceeds. The existence of the trust was to be twenty years after the termination of lives in being, and the property then held was to be sold and the proceeds of sale divided among the then shareholders. These shareholders were to receive shares of the par value of \$100.,

¹Eliot v. Freeman (1911), 220 U. S. 178.

according to the investment of each. Transferees of shares were to receive new certificates upon surrender of certificates of shares belonging to transferrors. No shareholder was to have any legal title to or interest in the trust property nor any right to call for partition. It was also provided that the trust might be terminated at any time by an instrument in writing signed by not less than three-fourths of the value of stock held by shareholders. The instrument also provided for meetings of shareholders. The trust owned one building leased to a single tenant and an office building with elevator service, janitor service, etc.

The other was called a "Department Store Trust," formed for the purpose of purchasing and holding certain parcels of land, also in Boston, and erecting a building thereon for a department store. This had similar provisions to the other, with power given shareholders to hold annual meetings and by a majority to elect and depose trustees and to alter and amend the terms of the trust agreement.

The opinion said: "The two cases now under consideration embrace trusts which do not derive any benefit from and are not organized under the statutory laws of Massachusetts. * * * Entertaining the view that it was the intention of Congress to embrace within the corporation tax statute only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law, we are of opinion that the real estate trusts involved in the two cases are not within the terms of the act."

As showing that the feature of these two trusts being "real estate" trusts had nothing to do with their being declared not subject to the corporation tax, another of these corporation tax decisions is greatly in point.² In that case it was held that a corporation whose sole purpose was to hold title to a single parcel of real estate subject to a long lease for the mere convenience of its stockholders, for receiving and distributing the

²Zonne v. Minneapolis Syndicate (1911), 220 U. S. 187.

rentals from such lease, was not subject to the corporation tax, because this was not "doing business within the meaning of the law." The court, however, was careful to say: "The corporation involved in the present case, as originally organized and owning and renting an office building was doing business within the meaning of the statute as we have construed it." Then it stated that: "It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease or the proceeds of any sale of the land if it should be sold."

Therefore, from the two decisions it is to be inferred, that though the two real estate trusts were doing business in such a way as would make a corporation or joint stock company organized under a statute liable to the tax, yet solely and only because they were trusts doing this business, they were not thus liable. But this point need not be left to mere inference from judicial reasoning, because in the main decision of these corporation tax cases,³ specific objection was made that certain corporations were "real estate companies, whose business is principally the holding and managing real estate." The court said: "We think it is clear that corporations organized for the purpose of doing business and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore land and collecting royalties, managing wharves, dividing profits and in some cases investing the surplus, are engaged in business within the meaning of this statute."

A word of caution is here indulged as to what was said in *Eliot v. Freeman*, *supra*. The court said Massachusetts has no statute authorizing the formation of a joint stock association, and, therefore, of course it was clear that the trusts considered could not derive, even if the trustors had wished so to do, any benefit from statute, but were forced to depend upon the common law for whatever rights they enjoyed. A few states have

³*Flint v. Stone Tracy Co.* (1911), 220 U. S. 107.

such a statute, but, as has been shown, such a trust instrument does not need its aid when it merely provides for several interests in trust capital or property. That these interests are represented by transferable shares does not make their owners associates, as has been shown. Caution should be used, however, not to form a business trust by means of a joint stock association statute, if avoidance of this corporation tax is to be completely assured.

The question here of excise tax under the federal statute is greatly different from that of excise tax under the Massachusetts constitution. The Judges of the Supreme Judicial Court of Massachusetts held, by a bare majority, that an excise tax could be imposed upon a privilege which is the exercise of a natural right, this being said in an advisory opinion by the Justices reported in (1908) 196 Mass. 603. The whole question there was what was a taxable commodity under the Massachusetts constitution. And it was held that transferable shares represented by certificates were such commodities both when issued by corporations and by voluntary associations. Three of the Justices dissented from this view, holding that shares in a corporation could be taxed, but those of an association could not.

§ 111. *Trust Taxable to Trustee or Beneficiary and Not to Both.*—In a New Hampshire case⁴ it was said: "When an owner has left his farm in trust for his widow and children, and the trustee, holding the legal title without any beneficial interest pays the farm tax and expenses out of the farm income, and pays the rest of the income to the widow and children, a second tax for the same amount is not assessed on the equitable title of the widow and children. For the purpose of taxation the legal title of the trustee and the equitable title of the widow and children are not more than the whole title, legal and equitable, which the testator had in his lifetime."

Then the opinion proceeds in a manner of reasoning peculiarly applicable to the question in hand, as follows: "And if the

⁴Morrison v. Manchester (1879), 58 N. H. 538, 563.

testator, dividing the equitable title and beneficial interest into four shares, gave two shares to his widow and one share to each of his two children, directed the trustee to issue to them certificates as evidence of their respective rights in the trust property and made the certificates assignable and available as personal property, like certificates of corporation stock, and if this disposition of his property were authorized by law, the united titles of the trustee and the widow and children would not be more than the title of the testator." The question of legal and equitable interests in such an estate was not involved, but the court was using premises of undoubted correctness for the conclusion, that there should not be taxation of deposits in a savings bank both upon it and its depositors. Whether the conclusion follows or not, the premises employed are incontrovertible in law.

As showing that a trust estate would be inequitably assessed, if taxed in the hands of the beneficiary when also taxed to the trustee, this same court said: "When a testator, having a son capable and a daughter incapable of managing property, leaves half of his estate to the son and the other half in trust for the daughter, the tax of the whole estate is not thereby increased one-half. The mere trust does not make the daughter's share of the public expense twice as much as her brother's; and the double taxation of her property would be the imposition of a penalty for a misfortune."⁵ In Maryland the principle that there cannot be two taxes on a trust fund was recognized and distinguished, where a tax on savings bank deposits was sustained, as follows: "The tax imposed on the deposits in Savings Banks is not in our opinion a tax on the property held by such Banks in trust for the depositors. * * * It is nothing more nor less than a tax on the Bank itself, upon its franchises and assessed in consideration of the privileges conferred by the State. The average deposits during a specified time are but a measure of the extent to which such institutions have exercised their franchises, the basis of which the amount to be paid may be computed."⁶

⁵Robinson v. Dover (1880), 59 N. H. 521, 528.

⁶State v. Central Savings Bank (1887), 67 Md. 290.

A savings bank case was considered in Massachusetts under a law that provided that depositors were exempt from direct taxation on the amount of their respective shares. It was claimed that taxing the bank on deposits was to nullify this exemption, but the Massachusetts court held, that the tax being levied only upon average deposits showed that it was an excise tax upon a privilege to operate a savings bank, that it was merely a corporate charge,⁷ the court arguing away constantly from the position that there was a tax on a trustee, when the beneficial owner had been exempted.

This holding is similar to that by the Federal Supreme Court by a majority of six to three,⁸ and ever since adhered to, that the shares of the capital of National Banking Associations are subject to state taxation without any reference to the amount of such capital invested in non-taxable bonds of the United States. It was considered in this case that "the tax is the condition for the new rights and privileges conferred upon these associations." Therefore, if there is a common law right in division of title into legal title and equitable interest, there is no new right and privilege to which a condition of taxation may be annexed, as specifically held in *Eliot v. Freeman*, *supra*. This court also said that "shares (of stock) are a distinct independent interest in property held by the stockholders,"⁹ an affirmation that hardly may be made as to an equitable interest in a trust; an interest in these business trusts that has its source purely in contract which adds nothing to the intrinsic value of the property itself or puts any new burden on the taxing power.

In an early Maryland case the question was, whether a tax should be assessed as to personal property at the residence of the trustee or where the *cestuis que trust* resided, there being no statute specifically providing as to this.¹⁰ The court in

⁷*Commonwealth v. People's Five Cent Savings Bank* (1862), 5 Allen (Mass.) 428.

⁸*Van Allen v. Assessors* (1865), 70 U. S. (3 Wall.) 573.

⁹*Farrington v. Tennessee* (1877), 95 U. S. 679, 695.

¹⁰*Latrobe v. Mayor, etc.* (1862), 19 Md. 13; *Ames Cases on Trusts*, 228.

reaching the conclusion that the tax was to be assessed at the residence of the trustee said, that when the trustee paid the taxes "the obligation of one entitled to the beneficial interest of property held by a trustee, to contribute to the public taxes, according to actual worth, is none the less satisfied, for in such a case the assessment of the tax to the holder of the legal estate, through him reaches and fastens upon the interest of the beneficial owner," a statement that is wide of the mark as to taxation of a corporation, because "shares are a distinct, independent interest or property held by the stockholder."

A New York case in holding that a trustee not in possession, the beneficiary being a non-resident, was not to be assessed because of his legal title, said: ¹¹ "Generally a man is not spoken of as the owner of property, who merely holds it as a trustee and in a representative capacity. He has the legal title, and he is assessed for it when it is within the state, but this is by express provision of statute, and such provision is not mentioned in the case of a trustee, whose trust property is outside of the state and not in his possession." Then referring to custody in the state making the property assessable there, the court says: "The statute as it is may lead to injustice in the double taxation of personal property, once to its absolute owner and again in the hands of his agents in the shape of securities in their custody and control in other states." This, however, would not be double taxation in the case of corporate capital and shares therein being taxed.

The usual, if not universal, method in taxation statutes is to group holders of property in trust in some such manner as the Rhode Island statute does, as follows: "All personal property held in trust by any executor, administrator or trustee, the income of which is to be paid to any other person, shall be assessed against the executor, administrator or trustee" etc. It would seem no more abhorrent to equity and justice and constitutional provisions against double taxation to tax property to an executor or administrator and again to legatees and heirs

¹¹People ex rel. Darrow v. Coleman (1890), 119 N. Y. 137, 140, 23 N. E. 488, 7 L. R. A. 407.

than to trustee and *cestui que trust*, and statutes in this grouping seem thus to view the matter. It was claimed that the Rhode Island statute made it possible for a resident *cestui que trust* to escape taxation by appointing a non-resident trustee. This was admitted, but the court said: "It is fair to suppose that the State intends to allow to other states the same right which it claims for itself and does not contemplate a double taxation."¹² If this does not mean it would be double taxation to tax the trustee in one place and the *cestui que trust*, then it is difficult to find that it has any bearing upon the objection that was urged.

In a Maine case¹³ where non-resident trustees were appointed by a will, the residence of beneficiaries was held to give no right to tax property in the hands of the trustees, the statute being like that of Rhode Island, the court saying it "could not affect trustees and property thus situated," saying also: "We do not hold, however, that the assessors of Augusta cannot assess a tax directly against the annuitants resident in Augusta for their annuities or other interests arising out of the trust." It was also said the trustees "could not be made amenable to the taxing powers of this state, since neither they nor their property were within the state or subject to its jurisdiction." For this, reliance is placed upon federal authority,¹⁴ where it is said: "No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction."

§ 112. *Taxing Resident Beneficiaries of Foreign Trusts.*—Some of the cases above discussed show that resident beneficiaries were held non-taxable as to their interests in a trust, the property of which was in the hands of non-resident trustees, but that holding was according to the form of the statute, the last of these cited cases, however, seeming also to say that such taxation was not even within state power, except that an annuity could be taxed, which also would be true had the trustees been resident trustees.

¹²Anthony v. Caswell (1885), 15 R. I. 159. But see Hunt v. Perry (1896), 165 Mass. 287, 43 N. E. 103.

¹³Augusta v. Kimball (1898), 91 Me. 605, 40 Atl. 666.

¹⁴Erie Railroad v. Pennsylvania (1894), 153 U. S. 628, 646.

In Michigan the constitution prohibits double taxation and it was claimed that, as this prohibited taxing a domestic corporation and the holders of its stock, so it prohibited taxing residents on stock in a non-resident corporation taxed upon its property outside of the state. The court by a majority of four to one held that the inhibition against double taxation only applies to such taxation within the state, and as stock has its *situs* at the domicile of its owner and is there taxed once, it stands on an equality with stock in a domestic corporation also taxed but once.¹⁵

In a later case¹⁶ this same court admitted there was a technical reason for saying that taxes are not levied on the same property when levied on capital and upon corporate shares therein, but this was not true in the sense of a constitutional inhibition of double taxation, and, therefore, where all of a foreign corporation's property was located in Michigan and there assessed, shares of stock owned by its residents could not be assessed.

A Pennsylvania case¹⁷ illustrates very forcibly the theory that the taxable interest in a trustee is purely, solely and indistinguishably but a representation for taxing purposes of the property of *cestuis que trust*. Thus a trustee residing in a borough in Pennsylvania was held liable for a state, but not for a borough, tax, on the theory that "the inhabitancy of the owner is made the test of taxableness for borough purposes." The court said: "It would be a cruel and absurd law that should subject the trust-moneys of non-resident orphans to borough taxation, merely because their trustee resided in the borough. For state purposes it is right enough to tax them, because the safety and value of the funds depend on the existence of the government, which such taxes go to support, and possibly something of the same reason may apply in behalf of county taxation, but what protection or value does the borough of

¹⁵Bacon v. Board of Comrs. (1901), 126 Mich. 22, 85 N. W. 307.

¹⁶Stroh v. City of Detroit (1902), 131 Mich. 109, 90 N. W. 1029.

¹⁷Borough of Carlisle v. Marshall (1860), 36 Pa. 397, 402.

Carlisle give to funds invested in Philadelphia? The inhabitants have an interest in the municipal government and are lawfully taxed to support it, but these taxes should be paid out of their own property, not out of property existing in Philadelphia, and owned by inhabitants of New York."

The theory of a tax being assessable against a trustee only because property to which he holds legal title is benefited by the laws of his domicile also finds illustration in a late decision by the Sixth Circuit Court of Appeals.¹⁸ The trustee in that case was a resident of Ohio and the *cestui que trust* resided in Connecticut, where the trustee was appointed. The property consisted of stocks and bonds deposited with a bank and trust company in New York, which collected dividends and interest and remitted to the trustee, who in turn remitted to the *cestui que trust*, deducting for his services, \$300.00 per year. The trustee was held not taxable under an Ohio statute which provided that "all property whether real or personal in this state * * * and all moneys, credits and investments in bonds, stocks and otherwise of persons residing in this state shall be subject to taxation."

The decision relied on a leading federal case,¹⁹ which said: "The power of taxation * * * is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business," and upon an Ohio case²⁰ construing that statute as referring to tangible property, real or personal, in the State and "all intangible property of persons residing in this State, irrespective of where the subject of the property may be situated." But the federal court thought, that as to intangible property "the person taxed must be in the jurisdiction of the state, not only personally, but officially, in the capacity in which he is taxed and in that capacity must be enjoying the benefits of the laws of the jurisdiction." "In the case of a

¹⁸Goodsite v. Lane (1905), 139 Fed. 593, 72 C. C. A. 281.

¹⁹State Tax on Foreign-Held Bonds (1872), 82 U. S. (15 Wall), 300, 319.

²⁰Myers v. Seaberger (1887), 45 Ohio St. 232, 235, 12 N. E. 796.

trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay." The court further said: "An examination of the cases will show, that where this tax has been sustained, either the trust estate or the beneficiary, or the trustee, as trustee, was receiving benefits from the State, for which it was only fair the trustee should pay." All of the trust property being intangible it was held non-taxable to the trustee residing in Ohio.

One need not agree with all of the reasoning in this case nor, under the facts, with its conclusion, but there seems much reason for holding that the state's jurisdiction over a person for taxing purposes may be broader than over one holding merely the legal title but not the beneficial interest. Therefore, while tangible property may be taxed because of location, intangible property should not be taxed to a trustee under the rule *mobilia sequuntur personam*. Such is the necessary principle to be followed, if double or triple or more greatly multiplied taxation is to be avoided, where there are more trustees than one, with each residing in a different jurisdiction. Authority is abundant that the trust property will be taxed upon some *pro rata* plan that will not subject the entire estate to more than a single tax. If separate tangible possession exists the tax will be proportional in amount, and if it cannot, each trustee will be taxed one-half or one-third or other fractional part according to their number.²¹

§ 113. *Massachusetts Legislation*.—Massachusetts statute, pursuing the theory that the beneficiary is the true owner and trust property ought to be taxed accordingly as he derives benefit, both from the state and its municipal divisions without regard to the particular residence of the holder of the legal title,

²¹Hardy v. Yarmouth (1863), 6 Allen (Mass.) 277; State v. Matthews (1859), 10 Ohio St. 431; Baltimore v. Stirling (1868), 29 Md. 48; Baltimore Appeal Tax Court v. Gill (1878), 50 Md. 377; Stinson v. Boston (1878), 125 Mass. 348; People ex rel. Darrow v. Coleman (1890), 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407.

requires it to be taxed to the trustee in the city or town where the beneficiary resides, and, if he is a non-resident, then where the trustee resides, and, if there is more than one trustee residing in different places, in equal portions.²² Scarcely might legislation more specifically declare that the law regards the beneficiary as the true owner, owing both general and local taxes in that capacity, if a resident, and, if a non-resident, there is a presumption of benefit to him from general and local municipal law, according to the residence of the trustee. This statute was before the Supreme Judicial Court of Massachusetts upon the question whether certificate holders in a trust were taxable at their residences or at the place where the business was carried on.²³ The court said: "If the certificate holders in this trust are partners within the meaning of section 27 of chapter 490, Part 1 of Mass. Statutes, 1909, their property was all taxable in the City of Boston, where their business was carried on," and "we do not think the provision exempting the certificate holders from personal liability for debts should be held to defeat the application of this section to the trust as a partnership. * * * In the leading and substantive features that distinguish ordinary partnerships, this association is within the spirit and meaning of the law of partnership. The limitations upon the power and liability of individual members, and the attempt to avail themselves of many of the privileges of stockholders in corporations, relate more to details and to the machinery of management than to the substantive purposes of the enterprise." The "substantive purposes" were to carry on a business and a business ought, under the statute, to be taxed where it is carried on, and, if various persons establish it and it is carried on for their benefit, the court thought they were partners for taxing purposes. Had the court been at all disposed to dispute the validity of the exemption from liability there would have been a much briefer answer to the contention, but on the contrary, it admits, or seems strongly to admit the validity of "limitations upon the power and liability of individual mem-

²²Mass. St. 1909, c. 490, § 23, cl. 5.

²³Williams v. Boston (1911), 208 Mass. 497, 94 N. E. 808.

bers" and speaks of "the *attempt* to avail themselves" of other things.

The case seems strong authority for the proposition, that, if the business of such a trust is taxable where it is located, it would be double taxation to tax those holding certificates of shares therein. Certainly this was so deemed in Massachusetts so far as other towns and cities were concerned. In other words, though the Massachusetts statute provides that a *cestui que trust* be taxed, through his trustee, in his town or city, yet a certificate holder in a trust need not be, because the trust is elsewhere taxed, the substantive purpose being to carry on a business for the benefit of investors.

§ 114. *Summary.*—It seems impossible to find any case maintaining or attempting to maintain the proposition, that the legal and equitable interest in the same property may both be taxed, at least where trustee and beneficiaries reside in the same state. On the contrary, all theory of this being lawful as to capital stock and shares of stock of a corporation is that they are distinct and independent properties, there being a legal interest in the former and a legal interest in the latter, that is to say, diverse legal interests in different things. In a trust there is a legal interest and its dependency, an equitable interest. If the latter is destroyed a beneficiary ceases to be, but the property resumes the status it had before the subsidiary interest began. Under the doctrine of limitation of power in the State to tax property only within its jurisdiction, as expressed in State Tax on Foreign-Held Bonds, *supra*, it is not perceived how a resident *cestui que trust* may be taxed as to his interest in a foreign trust, if no tangible property thereof is found at his domicile. His interest is not a *chose in action*. It is an interest merely represented by another who holds the legal title and lawful possession. If he could be taxed on tangible personal property elsewhere lawfully holden and taxable, then too he would be taxable on real estate in another state. As to intangibles the rule *mobilia sequuntur personam* should not override the legal title or make it have a double application. Therefore, it may be said that in the state, where both trustee and *cestui*

que trust resides one tax is all that may be imposed; and if they reside in different states the tax is imposed where the property is held..

If it is true, as stated in *Morrison v. Manchester*, *supra*,²⁴ that there is no difference in an equitable interest whether it is merely an aliquot part or represented by a transferable share therein, then it also would be true that a state may not discriminate by exempting the former and taxing the latter merely because of residence of the owner, even if it may tax it at all. Every state guarantees uniformity in taxation and equality in burden. This may not be absolute in practice, but it must be absolute in intention. Therefore, the holder of a transferable certificate cannot be taxed where the estate is elsewhere, unless the same rule is applied to every other trust interest whether it be testamentary or otherwise created.

CHAPTER XVI.

TRUSTEES AS MANAGERS.

§ 115. *Preliminary.*—It has been endeavored thus far to demonstrate that, so far as the general principles of equity are concerned, a business may be carried on by means of the vesting of its property in, and transferring its control to, trustees, who manage same under their duty to account to *cestuis que trust*, according to their several interests, the owners of these interests having alienable rights to an extent making the holders, in a sense, purely impersonal. Even where a court considered, that owners were associated in a company, whose property was vested in trustees, along with a complete surrender of its management and control and the trustees distributed its profits to certificate holders, by original constitution and by purchase of shares, it was said of a shareholder that "his rights were reduced (from that of an ordinary member of a company) so that the stockholder had only a right to participate in the election of trustees and receive his share of the money made,"¹ and the trustees "are liable for their fidelity to the trust and for all profits made in business, in substantially the same manner that a board of directors is liable to stockholders in an incorporated company." The particular differences in this liability, it has been attempted to show, are that in equity the trustee liability is more stringent, while operating "in substantially the same manner" as a board of directors, and that it is more personal as to each trustee. Nevertheless for trustees to conduct a business, agreements and declarations of trust need to be framed so that settlors may, *mutatis mutandis*, and under their common law powers, create a trust estate to be managed in a practicable way to the attaining of the end desired.

¹Estate of Oliver (1890), 136 Pa. 43, 59, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894.

The only magic in the creation of an express trust is the conveyance of a legal estate to one competent to take as a trustee for the benefit of one capable of being designated a beneficiary.² To the creation of such trust may be affixed directions for its management or disposal. Thus a will may authorize an executor as trustee to carry on a mercantile business, so that debts incurred therein may become chargeable against the trust estate and so endanger its existence, provided that the power so to do be unmistakably expressed.³ And the directions prescribed for the management and control of the trust may not be interfered with by a court of equity, unless the preservation of the trust itself demands such interference.⁴ It has been said that there is "extreme difficulty in applying even the doctrine of necessity to a case where the creator of the trust has plainly disclosed an intent to limit the benefit he intended, by an adherence to a course of conduct expressly mapped out, in the management of a trust."⁵

From these cases it is to be seen that the trust character of property is in no respect derogated from by specific directions governing the trustee, holding the legal title, in its management, and that these directions sedulously will be observed by courts.

§ 116. *Unity of Action by Trustees.*—The maxim *potestas delegata non delegari potest* applies to the office or power of a trustee. Thus in a declaration of trust in favor of shareholders in a tract of land which was to be sold by the trustee, either wholly or as to such portion as the persons holding a majority

²Foster v. Friede (1865), 37 Mo. 36; Brown v. Spohr (1904), 180 N. Y. 201, 73 N. E. 14; Estate of Smith (1891), 144 Pa. 428, 27 Am. St. Rep. 641.

³Eufaula National Bank v. Manassas (1899), 124 Ala. 379, 27 So. 258; Kirkman v. Booth (1848), 11 Beav. 273; Burwell v. Ca-wood (1844), 43 U. S. (2 Howard) 560.

⁴Johns v. Johns (1898), 172 Ill. 472, 50 N. E. 337.

⁵Pennington v. Metropolitan Museum of Art (1903), 65 N. J. Eq. 11, 23, 55 Atl. 468.

of the shares should specify, at such time or times and at public or private sales and for cash or convertible securities, and upon such notice as they shall direct, Sandford, Vice-Chancellor, said: "The instrument contains no reservation or provision of a power of appointment or substitution by Graham, of any person or persons to do these acts in his stead. Upon such an instrument delivered to each shareholder, each appears to have paid the price or consideration for his share. Each shareholder thus acquired a right and interest in the covenants and powers contained in the declaration of trust. The powers were to be executed by Graham personally. The manner of their execution was important to the parties in interest. His skill and success in effecting a sale; his economical conduct of the trust; and his judgment and impartiality in making a partition, if that should become necessary, were elements of the contract which the parties entered into by this trust deed, and which the court upon the construction of the trust, must infer were a part of the inducement for the purchase of shares. It seems to me perfectly clear, that such powers cannot be delegated, without an express provision in the deed creating the powers or the consent of all the parties."⁶

This somewhat extended extract is given, because it is an admirable statement and shows application of a principle to a case where the discretionary powers of the trustee were closely circumscribed, and, though this was so, yet in whatever of discretion there was vested in him, in this "each shareholder acquired a right and interest," just as in the covenants in the declaration of trust.

The lack of power of substitution or delegation, and the refusal of a court of equity to permit same, by trustees chosen by a testator, though a proposed substitution might appear both to them and to the court as more practicable toward accomplishing the purpose aimed at, is well illustrated in a Massachusetts case.⁷ This case shows that a donor gave to trustees a fund to

⁶*Suarez v. Pumpelly* (1845), 2 Sandf. Ch. (N. Y.) 336, 340.

⁷*Winthrop v. Attorney General* (1880), 128 Mass. 253.

found and maintain a museum of archeology, with the fund to be divided as stated, with accumulation as to one part for a stated time. The trustees were authorized to appoint a treasurer and upon his resignation it was sought through the assistance of the court to turn the entire management of the trust fund over to Harvard University, in connection with which the museum was to be founded and maintained. The court said: "It is a departure from the directions of the donor, which could be justified, if at all, only upon proof of the most pressing exigency. But the only reasons assigned by the plaintiffs are that their treasurer, who has acted without compensation, is about to resign, and that the agreement, if made, would be beneficial to the trusts, as it secures the services of efficient treasurers and custodians of the fund without charge, whose services they could not otherwise secure without great expense."

The above two cases are but illustrative of the universally received doctrine, as a principle, but it is not considered to be derogated from by the appointment of agents for the performance of merely ministerial duties incidental to a proper execution of the trust,⁸ especially when express authority to do this is given by the instrument creating the trust,⁹ a subject to be considered hereinafter. It necessarily follows that, as no trustee can delegate to another any part of his discretionary power, where there are two or more trustees, they must act as a unit and not separately.¹⁰ The reason for this rule is thus expressed in the Coleman case: "The power of sale conferred upon trustees and executrices must be presumed to have been conferred by reason of the trust and confidence reposed in them by the testator, and could be executed only by all those upon whom it was conferred acting jointly." It has been said that "this principle enters

⁸Spenglar v. Kuhn (1904), 212 Ill. 186, 72 N. E. 214; Donaldson v. Allen (1904), 182 Mo. 626, 81 S. W. 1151; Perry on Trusts (6th Ed.) Sec. 409.

⁹Wilson v. Stewart (1858), 3 Phila. (Pa.) 51.

¹⁰Coleman v. Connolly (1909), 242 Ill. 574, 90 N. E. 278, 134 Am. St. Rep. 347; Hosch Lumber Co. v. Weeks (1905), 123 Ga. 336, 51 S. E., 439.

into all cases depending on the discretion and judgment of the trustees in contradistinction to acts of a mere ministerial nature. The former requires the concurrence of all the trustees; the latter may be performed by one."¹¹ The case here cited says each trustee has, in case of necessity, an inherent power to do what is necessary "to the continued existence of the trust, at least, in the absence of an express negative" in the instrument creating the trust.

§ 117. *Provisions for Action by Less Than Full Number.*—Frequent expression is made of an exception to the rule of unity arising out of the instrument creating the trust, but this is *arguendo* and where made it is done by way of illustrating the strength of the rule. Thus Chancellor Walworth said:¹² "A trustee who has only a delegated discretionary power cannot give a general authority to another to execute the same, unless he is specially authorized so to do by the deed or will creating such power." And it has been held that where the instrument empowers a majority to act, this exception to the general rule will not be enlarged by implication.¹³ However, when there is action by a majority under a power in a deed or will plainly conferring it, such action has been upheld.¹⁴ And so it may be thus conferred on one of two trustees,¹⁵ though it is true that a majority may act where the deed "by a reasonable construction implies, if it does not expressly declare the power and authority of a majority of the appellees (trustees) to execute its provisions."¹⁶ A deed or will also may classify trustees, assigning to some, certain duties, and to others, other duties, though that classification be not absolutely fixed by the instrument, but

¹¹Vandever's Appeal (1845), 8 Watts & S. (Pa.) 405, 42 Am. Dec. 305.

¹²Hawley v. James (1835), 5 Paige 318, 487.

¹³Bascom v. Weed (1907), 105 N. Y. Supp. 459; 53 Misc. Rep. 496.

¹⁴Barney v. Chittenden (1849), 2 G. Greene (Iowa) 165; Attorney General v. Cuming (1843), 2 Y. & C. Ch. 139.

¹⁵Taylor v. Dickinson (1863), 15 Iowa 483.

¹⁶Ratcliffe v. Sangston (1862), 18 Md. 383, 389.

is dependent on its going into effect by "*leave*" of the trustees themselves.¹⁷ It is to be remembered, however, that the mere fact that a majority of the trustees may govern, where an instrument so provides, does not mean, necessarily, that they may act without consulting the others. Thus where it was provided by a trust instrument, that the business of a company was to be transacted by five trustees and a majority of them was to govern and that "if any trustee should be absent from the commonwealth, the others should have all the powers herein named," it was said by Shaw, C. J.: "Where the power is to deliberate and examine, and discretion and judgment are required there, although a majority may ultimately decide, yet all must deliberate and advise, or at least have full notice and opportunity to do so. The company, whose trustees they are, are entitled to the full benefit of the knowledge and discretion of them all."¹⁸ Thus it seems clear, that instruments creating trusts may provide for departure from the rule or principle of unity of action by trustees, but provisions should clearly define the limits of departure.

This rule of unity perhaps more correctly should be called a rule of co-operation in the exercise of the powers of the office of trustee; that is to say, it is a policy to secure the approval of the several trustees for the presumed advantage of the trust and its beneficiaries, and not to enable an outsider to claim the invalidity of an act by a single trustee or any number less than the whole in his interest or defense, and he may claim its validity when the act is in an emergency or it is ratified. Thus it was said by the Supreme Court of District of Columbia that: "It is undoubtedly true, as the general law, that when the administration of a trust is vested in several trustees, they must all co-operate in the exercise of the powers of their office, and cannot act separately or independently of each other. This is held by all the authorities on the subject. But this rule is not without its exceptions and qualifications.

¹⁷Duckworth v. Ocean Steamship Co. (1896), 98 Ga. 193, 26 S. E. 736.

¹⁸Heard v. March (1853), 66 Mass. (12 Cush.) 580, 584.

One trustee may in many things act as agent of all the trustees, especially in cases of emergency; and there may be ratification of the act of one trustee by his associates in the trust. In this case one trustee in express terms purported to act for the other as well as for himself. * * * This sale, being concurred in by both trustees, operated as a ratification by both of the previously existing agreements between Williams and the appellant.”¹⁹

This power of ratification by trustees is not confined merely to acts of one, or a less number than all of the trustees, but extends also to acts of an agent appointed by one or more, but less than all, of the trustees.²⁰ Summarized, it may be said, that whatsoever fairly comes within the discretionary power vested in trustees may be accomplished according to the usual methods adopted in the conduct of business, with there being ever back of them the power of a court of equity to require that their powers “are all to be exercised only for the purpose of effectuating the trust; and, when it appears that such powers are perverted to the detriment of the *cestui que trust*, the court will promptly interpose its protective authority.”²¹ This discretion may resemble that of a judicial officer, that is to say, the doing of one of two things, doing of either of which is within the power of trustees as conferred by the instrument creating the trust, may be compelled, so far as making him choose one or the other, but not directing which.²² It has been said that a court of chancery cannot “control the trustees in the exercise of a discretionary power reposed in them by the testator, nor compel them to exercise such discretion,”²³ but this statement was made in a case where such control was given to the trus-

¹⁹Ubhoff v. Brandenburg (1905), 26 App. D. C. 3. See also Phila. Trust S. D. & I. Co. v. Phila. & R. C. & I. Co. (1891), 139 Pa. 534, 21 Atl. 70.

²⁰Hill v. Peoples (1906), 80 Ark. 15, 95 S. W. 990.

²¹Albright v. Albright (1884), 91 N. C. 220, 225; Jones v. Jones (1888), 124 Ill. 254, 15 N. E. 751.

²²Matter of Stewart (1892), 131 N. Y. 279.

²³Dillard v. Dillard's Ex'rs. (1895), Virginia, 21 S. E. 669.

tees as made the estate in them "equivalent to a fee simple," and even in that case the court said: "It is perhaps true, that, if such discretion were exercised from fraudulent or improper motives, a court of equity might interfere, but in such cases it must be so alleged and sustained by the proofs." The three next above cited cases, and especially the last one, enforce the theory of the validity of special powers conferred by trust settlors and the jurisdiction of a court of equity to enforce the relation of trust that is created.

§ 118. *Appointment and Tenure of Trustees.*—It is unnecessary to cite authority that an instrument sufficient to create a trust may appoint its trustees, and, were this desired, cases which follow conclusively so presume. These cases relate directly to the question of tenure and substitution of trustees. A very stoutly contested case, decided by the Court of Appeals of District of Columbia and affirmed by the United States Supreme Court,²⁴ considered the grant of power in a will to one of two trustees and the beneficiaries, for sufficient cause and by unanimous resolution, to remove the other trustee from office, the trust being an active one. The Court of Appeals said: "The power to remove their trustee was vested in the defendants to this cause. The power to determine when there was good and sufficient cause for such removal was necessarily in them also, subject to the restraining power of a court of equity against the abuse of it. They exercised their right to determine that good and sufficient cause existed; they found that there was such cause; and they removed the trustee accordingly. Upon the face of their proceeding, it is beyond question that they acted within the scope of their authority." Then the court inquires whether or not their finding of such cause was "a pretense for the exercise of arbitrary and unreasonable authority," and concluding that there was "dissension, bitter and uncompromising," between the parties as to "active trusts in which the judgment and discretion of both trustees are necessary for their proper execution," the removal was not to be

²⁴May v. May, 5 App. Cas. D. C. 552; same case (1897), 167 U. S. 310.

deemed an arbitrary and unreasonable exercise of authority, the court saying it would not enter into any investigation of the causes of dissension.

The United States Supreme Court speaking by Mr. Justice Gray discusses the clause for removal as follows: "If no such power had been given them (the beneficiaries) by the testator, any one of them could have applied to a court of equity, and have had the trustee removed, on proving good and sufficient cause therefor, satisfactory to the court. If the words 'for good and sufficient cause,' in the codicil, mean only such cause as would be deemed by a court of equity to be deemed good and sufficient, the only effect of conferring the express power of removal would be to restrict the power of removal by requiring their action to be unanimous. This cannot have been the testator's intention. The extent of the power conferred appears to us to have been well and accurately stated by the Court of Appeals." These two courts, therefore, sustain the right of a settlor to vest in beneficiaries the power of removal, but the Supreme Court said by way of caution, that it must not be understood as approving the selection of their attorney as trustee, as his participation in a family controversy might make him unfit to be trustee, because the removed trustee was a beneficiary interested in the trust. It left this question to be dealt with by the court below. Though the codicil also gave the beneficiaries the power to appoint a successor, it is perceived that the court thought this power should be exercised with due regard to the rights of all beneficiaries and not in an arbitrary, unreasonable way. Thus it is perceived that in a trust a court of equity maintains its supervisory control over its administration, to the end of effectuating its purposes and maintaining in completest integrity the rights of each and every of its beneficiaries and preventing any and all undue advantage being obtained by one over another. These are the fundamentals of a trust, of which a court of equity will not permit any violation.

The power other than by court to appoint new trustees is

said never to exist except in express trusts as created by deed or will, or as said in *Perry on Trusts*²⁵ and approved by a Kentucky Court:²⁶ "The power to appoint new trustees in place of the original ones can only be given by the author and creator of the trust; for, in cases where courts are called upon to appoint trustees, authority to appoint successors will not be given, but recourse must be had to the courts *toties quoties*." Therefore it is seen how necessary it is in such trusts as this work considers, that full and specific provisions should be embraced in instruments creating them for the appointment of new trustees and their succeeding to the powers of the old ones.

The Circuit Court of Appeals of the Fifth Circuit,²⁷ rendering a *per curiam* decision, from which one of the three sitting judges dissented, considered a clause in a deed of trust giving to a majority of the bondholders the right to remove a trustee. The Circuit Court had denied the exercise of such right, because it was said this majority was removing the trustee, because he was proceeding to do that which the minority had the legal right to demand should be done, and the *per curiam* opinion said: "We find nothing in the record to show that there was any abuse of the power so unequivocally and clearly granted. * * * If the action of the majority of the bondholders is an abuse of the trust, or in any serious degree prejudicial to the interest of any bondholder, so that a court of equity should interfere against the exercise of the absolute right conferred upon the majority of bondholders, let the removed trustee or any bondholder in interest answer the bill to show cause." This opinion refers to *May v. May*, *supra*, as to the right of the removing parties to determine when cause for removal existed, and, therefore, when exercised it should operate immediately, unless a court of equity arrests its operation, because there is an abuse of the power. Presumptively, the exercise is lawful and divests the removed trustee of all power.

²⁵(6th Edition) Section 287.

²⁶*Grundy v. Drye* (1898), 104 Ky. 825, 839, 48 S. W. 155.

²⁷*March v. Romare* (1902), 116 Fed. 355, 53 C. C. A. 575.

As suggested in *May v. May* and *Grundy v. Drye*, *supra*, these provisions both obviate the necessity of applying to courts to fill vacancies and may add other reasons, such as mere preference for a change of trustees. An Illinois case shows that it may be for the former purpose.²⁸ Thus it was said: "The point that the fact that the will authorizes the trustee, in the event of his sickness, old age or for any other good cause appearing to him, to appoint his successor, renders the trust void, is clearly without force. His action in that regard, if arbitrarily or unwisely exercised, would be controlled by the court upon the application of the *cestui que trust*, even without this provision. There can be no doubt that the court would have the power to appoint some suitable person to execute the trust, if for any reason Jefferson Orr became incapable of doing so."

The claim of invalidity must have been on the ground that there was merely a fugitive sort of title in the trustee, but this was repudiated on the theory, that the intent to create a trust was the controlling idea and the designated trustee was appointed to take the place of a court to see, that it did not fail for want of a trustee, but this power, wholly in the interest of others, must be thus exercised, or a court of equity will interfere.

Substitution of trustees may be authorized either directly or upon a contingency, as for example where a deed of trust authorized a trustee, unwilling or unable to act in carrying out the trust, to appoint a substitute trustee, and should he refuse to appoint, then the lawful holder of the note secured by the deed of trust to appoint a substitute trustee.²⁹

§ 119. *Occasion for Appointment of Trustees.*—It has been seen that it is as competent for the creator of a trust to provide for the substitution of new trustees as it is within his power to create the trust,³⁰ but all illustrations in decided cases of

²⁸*Orr v. Yates* (1904), 209 Ill. 222, 240, 70 N. E. 731.

²⁹*Jacobs v. McClintock* (1880), 53 Tex. 72.

³⁰*Shaw v. Paine* (1866), 12 Allen (Mass.) 293.

the timeliness or occasion for the exercise of the power of substitution relate to contingencies, and not where terms of service prescribed or mere lapse of time may present occasion for the appointment of new trustees. Decisions where terms are not prescribed naturally speak of the necessity of conditions precedent to the appointment of new trustees, such as resignation, death, or conduct or circumstances subsequently arising.

§ 120. *Fixing Terms for Trustees and Election of Successors.*—The absolute power of the creator of a trust, as is seen, to prescribe upon what contingencies beneficiaries may remove trustees and select their successors would seem clearly to embrace his right to provide, that at stated intervals new trustees may be chosen. That such a provision is a reasonable one as to a trust, interests in which are represented by transferable shares, may not be doubted. It seems not only to make orderly the exercise of the power of removal, but to bring together the owners of interests, who may make proper investigation of the conduct of trustees in the execution of their trust, and by re-electing or removing them, approve or disapprove what they have done, whether within or without their discretion. In other words, such a provision tends to keep trustees and beneficiaries in touch with each other, and gives the latter opportunity for consultation with each other as to their common interests. This kind of trust calls for the exercise of a business policy and, therefore, its beneficiaries should have opportunity to select trustees, whose views accord best with those of the majority of beneficiaries. It is certain that the term theory of tenure and removal by election of successors, just as in corporations with respect to directors, has been adopted generally in trusts, whose interests are represented by transferable shares. Take for example, a great English case,³¹ often referred to and abundantly quoted from in this work, where it was provided that *cestuis que trust* at an annual meeting duly called could elect new trustees. The court said: "Of course that should be done in some way which will enable those who are actually present to bind those who are absent, to enable the majority

³¹Smith v. Anderson (1880), 15 Ch. D. 247.

to bind the minority, as otherwise the assent of the *cestuis que trust* could never be effectually obtained, and, therefore, a form is adopted similar to the provisions in articles of association as to meetings of shareholders, but that is only matter of form. They meet as *cestuis que trust* to give their assent, not as members of the partnership joining to carry on and control the business of the partnership."

In a Massachusetts case,³² in which the trust relation was squarely recognized, it was provided that any trustee could be removed and a successor appointed by three-fourths in value of the shareholders.

In an Illinois case³³ where there was a valid trust in behalf of shareholders therein, it was held that the fact, that by the trust agreement two-thirds of the shareholders in interest could remove any trustee and fill any vacancies however caused, in no way militated against its character as a trust, as this reservation of power was not the divesting at all of legal title in trustees nor unduly restrictive of their control. It is scarcely to be doubted that, were there found set forth in full in reported cases instruments creating trusts in which interests are represented by transferable shares, like provisions to those for the election of directors would appear, and they would have appeared had any point as to the validity of such a provision been raised.

But there is found, as indicated above, cases where shareholders may remove under a power exactly similar to what is called in *March v. Romare*, *supra*, "the absolute right conferred on the majority of the bondholders" in that case, and why stated times may not be fixed, as say annual meetings of shareholders, for the exercise of such a right, it is difficult to conceive. If they may be so fixed, then trustees' terms may be fixed, with "the absolute right" to be exercised or not at the pleasure of share-

³²*Hussey v. Arnold* (1904), 185 Mass. 202, 70 N. E. 87.

³³*Hart v. Seymour* (1893), 147 Ill. 598, 35 N. E. 246.

holders. In this connection it is suggested that terms of trustees should be stated to continue until their successors are duly appointed and inducted into office, and then the new trustee be clothed with the power and vested with the title that was in the former trustee, all power in him to cease and become null and void.

§ 121. *Joint and Several Responsibility of Trustees—Confidence reposed.*—It is to be remembered that the creation of a trust is the reposing of confidence by its creator in a trustee, or, if more than one, in trustees severally. He alone has the power of appointment and no one of several trustees has the right to object to another's acceptance of the appointment. He may refuse to serve with another, but, if he accepts, it would not seem that he should vouch for his fidelity, and whether he has personal confidence or not in such other's fidelity may not be the test of liability for his defaults. Thus it was said in an opinion by the Tennessee Supreme Court: "Two trustees are appointed to execute a trust, the final operation of which is not to be completed for years; they undertake to execute it, they are intended as checks on each other, have an equal control over the fund, are mutually bound to attend to the interest of the trust, and shall one of them be permitted to go to sleep and trust everything to the management of his co-trustee, and when in the course of ten or fifteen years, the fund having become wasted, and his co-trustee insolvent, he is called upon to make it good, shall he be heard to say he had implicit confidence in his companion, and permitted him to retain all the money and appropriate it as he pleased, and that he ought not therefore to be charged? Surely not; it is neither law nor reason."³⁴ It is to be noticed that the court does not say, at all, that the defendant was responsible for the mere default of his co-trustee, but for the blind confidence which permitted that default to become disastrous. The court also said: "If one trustee wrongfully permit the other to detain the trust fund a long time in his own hands without security, he will be deemed liable for any loss," an admission that he

³⁴Deaderick v. Cantrell (1837), 10 Yerg. 263, 31 Am. Dec. 576.

might detain it a reasonable time without his default in appropriating it being chargeable to his co-trustee.

The conclusion is that each trustee is trusted by the settlor as to the proper exercise of his authority, whether that result in loss to the trust estate or not, but beyond that each trustee must be awake and active in behalf of the interests of the trust estate.

§ 122. *Acts and Defaults of Co-Trustee.*—The correctness of the conclusion just above stated is illustrated by many cases where it was sought to hold trustees liable for the defaults of co-trustees. Thus the Pennsylvania Supreme Court held a trustee liable for the default of his co-trustee, because it was held that he had “reason to believe that his co-trustee was not acting in good faith or might convert the trust funds to his own use” and “it was incumbent upon him to take necessary steps to prevent such misapplication of the funds.”³⁵ The opposite conclusion was reached by the New York Court of Appeals where the facts showed a conversion by a co-trustee, notwithstanding that the fund converted was turned over by two of three trustees to the one converting it.³⁶ Judge, afterwards Justice U. S. Supreme Court, Peckham said: “We have read many authorities on this branch of the law. They are numerous and the courts have said that, if the trustee unnecessarily do an act by which the funds are transferred from the joint possession of all to the sole possession of one, the trustee who does this unnecessary act must be held liable for the due application of the fund by his co-trustee. The question is what is meant by the word ‘unnecessarily,’ and it would seem to be that an act is unnecessary when done outside the usual course of business pertaining to the subject. In *Bruen v. Gillet* (115 N. Y. 10) the funds were turned over to one of the assignees without the slightest necessity and they continued in the possession of the assignee with the knowledge of

³⁵*Adams' Estate* (1908), 221 Pa. 77, 70 Atl. 436, 15 Am. & Eng. Anno. Cas. 518.

³⁶*Purdy v. Lynch* (1895), 145 N. Y. 462, 40 N. E. 232.

his colleague that they were being used in his private business. In *Gasquoine v. Gasquoine* (1894), 1 Ch. 470, an act which was done in the regular course of business in administering the property was held not to be unnecessary, and the trustee was held not liable for a resulting loss by the dishonesty of his co-trustee. Numerous authorities are cited in these two cases upon this subject." In the case at bar a very large sum came into the hands of three trustees which was to be paid out to depositors in a savings institution. The business of making these payments was left to one of them, checks being made in his favor from time to time. All of the trustees were men of high character. Out of over \$260,000 the single trustee defaulted as to \$33,000. The court said: "It was a usual, proper and ordinary way to make payments to these 700 odd creditors, under the circumstances above detailed, through the hands of one who was acting in the double capacity of trustee and receiver, and who in his latter character had all the data requisite to make the payments and to obtain accurate information as to the amount of the indebtedness in each case. And we do not think it was necessary for each trustee to attend and sign each check and make such payments instead of placing sums from time to time in the hands of the trustee-receiver and permitting him to make the payments."

The great weight of authority lies within the boundaries of these two cases, i. e., *Adams' Estate* and *Lynch v. Purdy supra*, the gist of liability being negligence *vel non* contributing to loss from a co-trustee's default. Thus it has been said: "The principle of the cases is, that, if the estate be once properly invested, the securities may be lodged in the hands of one trustee and he be permitted to collect the interest and pay it over to the tenant for life, and the other trustee will not be liable for default in paying over the interest, until he has notice of some default or misconduct on the part of his co-trustee. This rule is based upon the circumstance, that it is practically impossible for both trustees to attend in person to the collection of the rents or interest."³⁷ This is but to say that confidence in the

³⁷*Dyer v. Riley* (1893), 51 N. J. Eq. 124, 26 Atl. 327.

integrity of each of several trustees is just as firmly reposed by a settlor as where there is a single trustee, and it is not negligence for each trustee to show the same confidence until his suspicions are, or should have been, aroused. This principle is well applied by the U. S. Supreme Court³⁸ in an opinion affirming and strongly commending the opinion by the Supreme Court of District of Columbia in the same case.³⁹ The co-trustee, a man of excellent reputation for business integrity, was found, upon his death, to have squandered many estates in his custody. The surviving trustee recovered a small dividend by suit, and then he was sued by the *cestui que trust* for the remainder. The opinion, after saying that it was not contended as a matter of law that there was any liability for the mere malfeasance of a co-trustee, said: "What is contended is that an abandonment of discretionary power by a trustee to a co-trustee, where the trust is entitled to the united discretion of both, is such an act of supine negligence as to render the trustee who has abandoned his active participation in the management of the trust liable for the losses occasioned by the misconduct of the co-trustee." This principle, though sound, was held not applicable to the facts of the case, and the court then adopts the following language used by the Supreme Court of the District: "After a loss has occurred, as in this case, by the positive fault of some one, it may be easy to say how it could have been prevented; but in order to hold someone also fairly responsible, the point of view held by the party sought to be made liable at and before the loss occurred is the only safe point to assume. * * * * * From the light of the circumstances shown, I cannot convince myself that George F. J. Colburn was guilty of any such negligence as to render him liable."

The following language in the opinion of the lower court, strongly approved as above stated, appears: "A co-trustee cannot be held responsible for loss or injury to the estate occurring through the fault of a co-trustee, if he himself has been blameless."

³⁸Colburn v. Grant (1900), 181 U. S. 601, 45 L. Ed. 1021.

³⁹Colburn v. Grant (1900), 16 App. Cas. D. C. 107.

§ 123. *Trustee Seeking Direction of Courts.*—One of the advantages, that may be deemed to exist in respect to trust estates embarked in trade, is the general right of the trustee to apply to a court of equity for direction in the execution of his trust. This doctrine has been thus expressed: "There is no question that in cases of express trusts the trustee, if in doubt, may, for his protection, apply to a court of equity for a construction of the instrument creating the trusts, and for their execution under the court's direction and supervision. Cases of that class form an exception to the general rule that courts of equity will not declare future rights but will leave them to be determined when they come into possession."⁴⁰ This jurisdiction has often been sustained as to wills, but solely because they create trusts,⁴¹ in which cases courts of equity will construe wills, and "give directions to the conduct of such trustees in the administration of the trust" under the will. It is suggested that a will containing a testamentary trust would possess an advantage over another not creating such a trust, in the event of there being ambiguous provisions. This is well exemplified in a Massachusetts case,⁴² which ascertained merely the rights of devisees in a will creating a trust.

As showing how important this advantage is are the remarks of Sharswood, J.,⁴³ in a case where it was held that the Pennsylvania Orphans Court had no such advisory power: "It would, perhaps, be a very convenient practice immediately upon the death of a decedent to have all possible questions which might arise upon the construction of his will and in the settlement of his estate, settled by a decree of the orphans' court *in limine*, and by way of anticipation and, by an appeal to the Supreme Court from such a decree, have a final and con-

⁴⁰Diggs v. Fidelity & Deposit Co. (1910), 112 Md. 50, 75 Atl. 517.

⁴¹Hoagland v. Cooper (1903), 65 N. J. Eq. 407, 56 Atl. 705; Mersman v. Mersman, 136 Mo. 244, 37 S. W. 909.

⁴²Chase v. Ladd, 155 Mass. 417, 29 N. E. 637.

⁴³Willard's Appeal, 65 Pa. 265; approved in Morton's Estate (1902), 201 Pa. 269, 272, 50 Atl. 933.

clusive determination of the subject. It would certainly save counsel a great deal of responsibility in giving advice."

As showing that courts of equity have no inherent power to construe a will but that this is merely an incident to its jurisdiction over trusts abundance of authority may be cited.⁴⁴ Therefore all of these cases are authority for jurisdiction in the direction of trustees in the execution of their powers.

§ 124. *Special Importance of Advisory Power as to Trading Trusts.*—The importance of such a power, the exercise of which is to be upon application of the trustee takes on a new phase in the case of a trust estate embarked in trade. We know that corporations, when the exigencies of affairs demand that there shall be created a bonded indebtedness, first consult eminent counsel as to its legality, and the matter is of such vital importance that, if there is the least question in this regard, the bonds may either not be marketed or at a great disadvantage. If, however, a trust estate in business desires, under or without special provisions in a trust instrument, to do the same thing, all doubts upon the question judicially may be determined in advance and the court could provide for the security of investors in such bonds. Were a court to refuse to entertain an application for direction in such a matter this itself would be approaching adjudication, that the authority was so clear and free from doubt that the trustee needed no directions in the premises.⁴⁵

The illustration of a bond issue is one that probably would first come to the mind of anyone, but it is conceivable, that in the case of a trust estate in business it often might be desirable for other proposed steps by trustees judicially to be approved by a court of equity before they are taken.

⁴⁴Monarque v. Monarque, 80 N. Y. 321; Harrison v. Owsley, 172 Ill. 629, 50 N. E. 227; Clark v. Carter, 200 Mo. 515, 98 S. W. 594; Hart v. Darter, 107 Va. 310, 58 S. E. 590, 15 L. R. A. (N. S.) 599.

⁴⁵O'Cain v. O'Cain, 51 S. C. 348, 29 S. E. 68.

§ 125. *Question Must be Substantial and Involve Actual Doubt.*—It is to be said, that, while trustees have the right for their protection to invoke the direction of the court as to a proposed step or as to the alternative of one of two courses necessary to be taken, yet the court is not to be resorted to upon some fanciful or speculative doubt, or where it is doubtful whether proposed action may be for the benefit of the trust estate. This equity jurisdiction, so far as direction in execution is concerned, may not be thought to be of value, so far as the alternative spoken of is concerned, but its particular importance is in regard to administration of the trust estate as a going concern in business, though the right to have a court construe a trust instrument in case of doubt is not an unimportant right.

The rule deduced generally is that a court of equity will not entertain a bill for direction, unless there is a pressing necessity therefor. Thus an instruction was requested as to the duty of the trustees to give a bond payable to the Probate Court as required by statute and perform such duties and render such accounts as is required of trustees required to give such bonds. The court thought: "That the instruction thus requested is not as to the duty of trustees who in the administration of a trust estate find themselves embarrassed by difficulties. The principal requisites for a bill for instructions have often been said to be the possession of a fiduciary fund, of which some direction is necessarily to be made presently; conflicting claims or the probability thereof; and the existence of no other means of determining rights or demands, so as to protect a trustee from the risks of future liability or controversy."⁴⁶ In this case it was thought the probate court could determine the question involved. It is to be noted that the court does not say that other embarrassment, than such is as is spoken of, may not receive the attention of a court of equity, but it is to be gathered, that there must be embarrassment of a substantial sort.

⁴⁶*Bullard v. Attorney General* (1891), 153 Mass. 249, 26 N. E. 691.

In New Jersey the right of trustees to ask instruction of the court is whether they "are at the present time confronted with the duty of pursuing a course of conduct about which they are in doubt, and concerning which they require instructions from the court."⁴⁷ That instruction may be given in other cases than regards the disposition of a fiduciary fund is well shown in a prior New Jersey case.⁴⁸ There the court said: "If trustees disclose a situation of their trust in which a slavish adherence to the terms of the trust will operate to wholly prevent the benefits intended by its creator and they seek instructions and directions as to their duty, I think that instructions and directions for a course of conduct, which though differing from that prescribed by the terms of the trust, will actually carry out the intent of the creator, may well be grounded upon and sustained by the necessity of the case. The benefits intended for the beneficiaries are main subjects of consideration. The modes in which those benefits may be attained are incidental and necessity may require a change of mode to produce the intended effect." This case shows, that, even though the usual reason for applying is the trustee's protection, yet the advantage of the beneficiaries also gives ground therefor. Were the rule otherwise it would be something akin to misfortune; a court, supposed to be alert to protect *cestuis que trust*, should be equally as open for their protection as it is for that of the trustee.

§ 126. *Effect on Trust Estate of Making Application for Direction.*—There is authority that the making of such an application does not have the effect of thereafter placing the trustee in the position of a trustee of the court's appointment with powers limited in its decree,⁴⁹ and certainly this would not be the case where direction is merely asked as to an incidental thing under the general powers vested in the trustee.

⁴⁷Hewitt v. Green (1910), 77 N. J. Eq. 345, 77 Atl. 25.

⁴⁸Pennington v. Metropolitan Museum of Art (1903), 65 N. J. Eq. 11, 55 Atl. 468.

⁴⁹Green v. Putney (1848), 1 Md. Ch. 262; Cromey v. Bull (1883), 4 Ky. L. Rep. 787.

What might be the rule where this instruction practically covers the whole trust scheme it is unnecessary to inquire. The court would scarcely impose such a condition on its assistance being given, for it does not penalize the asking of assistance nor is a court of equity merely ambitious to enlarge its jurisdiction.

This subject might be pursued at greater length but there seems little need therefor. The purpose here is merely to show that a trust is so protected by the chancellor, that there is "an exception to the general rule that courts of equity will not declare future rights,"⁵⁰ but they will declare them and that declaration will be the law of the case in which a direction is given notwithstanding it may be erroneous,⁵¹ because action thereunder is to be "regarded as accepted by the parties in interest." For this estoppel to have the necessary force stipulations in the constating instrument may provide, either that direction may be asked without notice to *cestuis que trust* or that it be called to the attention of a regular or stated meeting of the shareholders.

§ 127. *Limitation of Corporate Capacity to its Domicile.*—Corporations are largely limited in their right to act to the jurisdiction wherein they are organized. An extreme expression of this view is found in an oft-quoted *dictum* of Chief Justice Taney, which reads as follows:—⁵² "It is very true, that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and has no longer obligation, a corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty."

Migration, however, is effected by corporations in a limited degree and in accordance with limited legal authority. Directors may generally hold their meetings outside of the state, this being justified in law on the grounds that the directors are

⁵⁰Diggs v. Fidelity & Deposit Co., *supra*.

⁵¹Thorn v. DeBreteuil (1904), 179 N. Y. 64, 83, 71 N. E. 470.

⁵²Bank of Augusta v. Earle (1839), 38 U. S. (13 Peters) 519, 588.

mere agents of the corporation, and that no attempt is here made to effect any action on the part of the corporation in its artificial capacity. It is a general rule that stockholders' meetings must take place in the State wherein the corporation is created.⁵³

The rights of parties, particularly those of stockholders, are often injuriously affected by the fact that the internal affairs of a corporation are only subject to the laws wherein the corporation is created. Thus a suit may often have to be brought in some different State, although all the individuals concerned are in the home of the complainant. This hardship would not apply to trust estates where the management is carried on elsewhere than the place wherein the trust has been created. The jurisdiction of equity which applies *in personam* qualifies it to give relief where service is had upon the individual trustee against whom complaint is made. This subject has been treated in a prior chapter on "Actions by and against Trustees."

Corporations in doing business in other States and countries rest purely upon comity and not upon right. In the leading case of *Paul v. Virginia*,⁵⁴ it was held that foreign corporations may be excluded at the will of the State, or admitted under whatsoever conditions the State may impose. There are, however, some exceptions to this rule, which are noted in the case of *Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania*:⁵⁵ "The only limitation upon this power of the State to exclude a foreign corporation within its limits, or having offices for that purpose, or to exact conditions for allowing the corporation to do business or have an office there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by State authority."

The result of the authority of the several states and countries

⁵³Cook on Corporations (6th Edition), § 589.

⁵⁴(1868), 8 Wall. 168.

⁵⁵(1888), 125 U. S. 181, 190.

to impose upon foreign corporations conditions precedent to their right to do business therein, is the multiplying of minute regulations in statutory law. This increase has been accentuated by some states and countries granting more liberal charters than are by the policy of other states and countries allowed, and this merely for purposes of local fees in the granting of charters, or, at least, there is a well-settled suspicion to this effect. Such restrictive legislation, however, must be equal in its application and affect corporations from other states less liberal, and thus the penalty intended for the few must be borne by the many. Some of these restrictions have reached the point where it is almost impossible for many desirable businesses to meet the conditions local statutes impose. To overcome this difficulty, foreign corporations frequently smuggle their business into states by means of domestic corporations organized by "dummy" incorporators and officered by "dummy" directors.

The usual conditions imposed upon a foreign corporation are that it file a certified copy of its charter in the foreign state, subject itself to a license tax, and appoint an agent for the service of process. Questions of service on foreign corporations crowd our courts with perplexing questions. Numerous decisions upon statutory phraseology result, and cease to be of importance when statutes change. Regulations upon foreign corporations, in other aspects, have given rise to many intricate legal problems, with which our courts are constantly struggling.

§ 128. *Trust Estate Distinguished from Corporation.*—It is thought that the restrictions placed upon foreign corporations cannot be applied to trust estates engaged in business. The former are created by statute; the latter, by contract. The power of the corporation is measured by the law of its domicile, or the law where it acts if away from there. The trustee, and not the trust estate, acts as an individual and binds the trust estate, or not, everywhere. Therefore, in case a trust estate is organized elsewhere than where its business is to be conducted,

the trustee is merely an individual, with defined powers as to binding the estate, exercising the rights of an individual the same as any other individual in like circumstances. If there may be any choice of place for organization different from the place of business, it probably would be, either because of the law of that state as to the trust relation between trustee and *cestuis que trust* as there construed or because the power of the trustee as to binding the trust estate in such an instrument has received construction. But this could in no way affect the right of the trustee personally to act or contract and thereby be personally bound.

§ 129. *Constitutional Protection.—Trust Estates May Do Business in Foreign States and Countries on a Basis of Common Right.*—This question has been aptly considered for the purposes of this treatise in three cases involving the validity of legislation passed in Indiana in 1879, and which provided as follows:

“It shall be unlawful for any person, association, or corporation to nominate or appoint any person as trustee in any deed, mortgage, or other instrument in writing (except wills) for any purpose whatever, who shall not be, at the time, a *bona fide* resident of the State of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the state, to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the state, then his rights, powers and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the provisions of the act to which this is supplemental.” (2988 R. S. of Indiana. 1881.)

In *Farmers Land & T. Co. v. Chicago, etc.*⁵⁶ R. W. Co., it was said of this statute:

“It is a statute which denies to residents of other states the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right

⁵⁶(1886), 27 Fed. 146.

is asserted to deny to persons, associations, or corporations within or without the state, power to convey to any person in trust, not resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding property within the state, and to that extent from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States can not be denied the right to take and hold absolutely real or personal property in any state of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship. Section 2, of Article 4, of the Constitution of the United States declares that the 'citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states'. 'Attempt will not be made', say the Supreme Court of the United States, in *Ward v. Maryland*, 12 Wall, 418, 'to define the words "privileges and immunities", or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it is sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate.' "

The above was quoted with approval by the Supreme Court of Indiana, and the statute referred to was declared by it to be

unconstitutional.⁵⁷ A federal court in one of the districts of the state came to the same conclusion.⁵⁸

§ 130. *Distribution of Earnings of a Trust Estate in Business.*—Possibly there is no feature in the framing of a trust instrument for the creation of a trust estate as a business company more demanding careful attention than what it provides as to distribution of its profits. The estate embarks in trade just as does a corporation or a partnership and this may prove to be a successful venture or the estate may be wrecked on the shoals of disaster. It is an easy matter to provide for the distribution of such income as rents or interest, but a different thing to provide for distribution of profits and still have due regard to a business being conserved, so that profits may continue to be earned. And even the character of the business to be done presents each its own problem. Thus the development and projected exhaustion of a mine is different from the building of, extension and preservation of a mercantile or manufacturing business. The general policy of the former is directly opposed to that of the latter.

In corporations the declaration of dividends is regulated by statutes only in the way of forbidding their payment out of capital, and it has never been held, that directors should, contrary to their judgment as to what is the best interests of the corporation, distribute at any time the then total earnings of a corporation. In the first place it's hard to say what are the total earnings because there is wear and tear that should be repaired and only estimates may be made of disbursements necessary to restore property to and keep it in fit condition. In the second place surplus cash may be required to avoid having to pay interest on loans reasonably necessary for the successful prosecution of any business.

But as to all this it is contended, that the position of a trust estate in business has every advantage, that may be claimed for a partnership, without the individual liability of partners, and

⁵⁷Roby v. Smith (1891), 131 Ind. 342, 30 N. E. 1093.

⁵⁸Shirk v. LaFayette (1892), 52 Fed. 855.

a greatly superior position to that of a corporation. It is thought that a careful perusal of a recent decision⁵⁹ by the Massachusetts Supreme Judicial Court in connection with a copy of the articles of association of Massachusetts Electric Companies,⁶⁰ the trust referred to in that decision, will demonstrate both of these propositions.

That decision speaks of the common and preferred shares authorized by the trust and the full and exclusive control and management of its property, except "trustees could not sell, mortgage, pledge or incumber or dispose of any shares of stock or other property unless the consent of the holders of at least two-thirds of each class of shares had been given at a meeting called for the purpose." There was a provision that to acquire additional property the trustees could with approval of two-thirds of shareholders issue new shares. But the interest on the preferred shares fell into arrears and no dividend had been paid on common shares. The trustees reported that it was inadvisable to create a floating debt, and asked for authority to issue additional preferred shares to be offered at par in payment of arrears of interest to the holders of original preferred shares.

The question in the case was whether these additional shares were income, or an enlargement of capital, a life tenant claiming the former. The court, however, thought the old and the new shares together were principal. It was said that "while the association is not a creature of our statutes governing the formation and powers of corporations, but is organized and exists at common law, there is no ground for any distinction of the principle announced in our decisions that in whatever manner described or apportioned, an addition to capital stock generally is treated as capital belonging to the remainderman, and not to the life tenant." This case demonstrates, that just as a trust instrument is capable, originally, of being framed to suit the creators of the trust, so it may be changed as exigency demands, even to increasing the number of its shares without

⁵⁹Gardiner v. Gardiner (1912), (Mass.) 99 N. E. 171.

⁶⁰Exhibits, *infra*.

additions to its capital, if the equitable owners so desire. This a corporation generally would not have the right to do, because its original capital must be divided into no greater number of shares than will make up that capital. In this case, for example, a corporation would have been compelled to do what the trustees avoided doing. They advised that to create a floating debt to pay the arrearage of dividends to preferred stock would tend to impair the credit of the trust, therefore, they increased the number of shares in trust assets, by consent of shareholders and they avoided this result. Could a corporation do the same thing? We think not, because a corporation trades on its capital, which falling below the aggregate of its shares would become thereby impaired and such an arrangement made for paying dividends would be a statutory offense. But a trust with transferable shares may make the number of its shares as few or as many or increase or diminish them, as contracting parties see fit. This demonstrates that a corporation trades on a basis that may be fictitious, that is to say, on its capitalization, for whether its assets have increased or diminished it must always regard a dead line in the payment of dividends. A trust in business trades on its assets and it is at liberty to divide its earnings as net or gross as it pleases, where there is no obligation to remaindermen. Therefore its management may be with a freer hand if that is desired, or with a stricter one, if it is sought closely to restrict trustees.

This theory suggests also, that if it might be desired for an association to distribute assets as dividends and thus go into gradual liquidation or because it has more assets than may be profitably employed there is no restraint upon their doing this, if creditors both subsisting and prospective are honestly dealt with. Conversely if it should be desired to add profits to assets for any reason connected with business needs this could be done at any time.⁶¹

Of course it is to be remembered, that these results must be within the purview of the original trust instrument, either

⁶¹ §94 of this book on the subject of accumulations.

as it exists or may be amended, for vested rights must always be respected. It is thought that more minute suggestions ought not to be made on this subject, as each business enterprise demands its own treatment. It might be provided as to how notice of payment of dividends should be given, in what form payment is to be made and evidence of receipt thereof, by the holders of shares.

§ 131. *Trustees' Compensation.*—The theory of securing for the management of trust estates absolute impartiality has formulated in English decision the principle that a trustee can "make no profit out of his office."⁶²

This means that he is not to be placed in any position where his interest may be opposed to his duty. But this principle expresses an ethical, rather than a practical, ideal and if it is not reasonably attainable, it does not demand that otherwise no trust nor trust relationship shall exist. Thus we perceive, that in trusteeships under statute the policy of the law fixes compensation and presumes, that for that compensation the rule of responsibility may be more strictly applied than were gratuitous services rendered. It may be remarked, however, in passing, that though the ideal is that a trustee should serve without compensation, yet the service was so greatly connected with the interests of women and wards in chancery, that it never was suggested, that rigidity of conduct in gratuitous service by a trustee, made trustees stand like directors of a corporation, as to whom it was thought they should be held to a less degree of care, because their services largely were gratuitous.⁶³

But this principle of no compensation unless the trust instrument specifically so provides is not by any means of universal application. Indeed it has so far fallen short in this regard as

⁶²II Perry on Trusts and Trustees (6th Ed.) § 904 and cases cited.

⁶³§ 135, *supra*, especially *Citizens' Building Ass'n. v. Coriell* (1881), 34 N. J. Eq. 383.

to be called "the English rule" as distinguishing it from what is known as the American rule which allows "courts of equity to exercise a just discretion and make or withhold allowance as they consider the particular circumstances require."⁶⁴ The opinion in a Florida case goes into an extended review of the English and American cases, and shows that only a very few of the latter and those very early in our history followed the former.⁶⁵ Thus in the Federal Supreme Court, Justice Grier said: "In England courts of equity adhere to the principle, which has its origin in the Roman law that a trustee shall not profit by his trust and therefore that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services, and in most cases it is gauged by a fair percentage on the amount of the estate."⁶⁶

There appears running through American cases the idea, that in the absence of provision about compensation in the trust instrument or where such provision does not fix the measure, ordinarily this is determined by analogy or from statutes on this subject,⁶⁷ though the circumstances may be looked to and a yet larger allowance made than is specifically provided for. In England, however, compensation may be provided for in the trust instrument.

§ 131a. *Trust Instrument Fixing Amount of Compensation.*—Naturally as the English rule is little recognized in this country provisions in trust instruments for compensation of trustees would not receive particularly strict construction.⁶⁸

⁶⁴ 39 Cyc. 481 and citations.

⁶⁵ *Muscogee Lumber Co. v. Hyer* (1882), 18 Fla. 698, 43 Am. Rep. 332.

⁶⁶ *Barney v. Saunders* (1853), 57 U. S. (16 How.) 535, 542.

⁶⁷ *Wilder v. Hast* (1906), 29 Ky. L. Rep. 1181, 96 S. W. 1106; *Berry v. Stigall* (1907), 125 Mo. App. 264, 102 S. W. 585.

⁶⁸ For strictness of construction under the English rule, see *Clarkson v. Robinson* (1900), 2 Ch. 722.

Also it may be said, that as the American rule allowed compensation, though not provided for in a will creating a trust, *a fortiori* would a liberal construction be placed upon provision in other trust instruments and especially in one for the carrying on of business.

Whenever the amount of trustee's compensation is by contract between trustee and beneficiary its reasonableness is not a matter of inquiry, as "such contracts are not prohibited by law, and when honestly entered into between trustee and beneficiary the courts will not interfere therewith. (*Bowker v. Pierce*, 130 Mass. 262.)"⁶⁹ Even if the deed fixes the compensation and it appears it is too low to procure competent persons as trustees therefor a court of equity will not allow the trust to fail or be administered less faithfully and will correct the matter by allowing additional compensation,⁷⁰ or if a supplemental agreement add other duties than under the original trust additional compensation may be allowed.⁷¹

Thus it is seen, that in trusts of the nature this work treats it is advisable that provisions be specific as to amount of compensation to be allowed trustees, making such a definite expense of the business. This indeed is the only way for any determination to be reached as to what are the earnings to be distributed among the *cestuis*. Of course, it may be provided that compensation shall be fixed for a time less than the trust term, and then rearranged by resolution at a meeting, regular or special, of the *cestuis*. But in one way or other the amount should be determined in advance of the rendition of service for a particular period, so that there will be no occasion for application to a court of equity on this point.

As appointees of trustees are their officers and agents, whose

⁶⁹*Ladd v. Pigott* (1908), 215 Mo. 361, 370, 114 S. W. 984. See also *Louisville Trust Co. v. Warren* (1902), 23 Ky. L. Rep. 2118, 66 S. W. 644; *Turnbull v. Pomeroy* (1885), 140 Mass. 117, 3 N. E. 15.

⁷⁰*Biscoe v. State* (1861), 23 Ark. 592.

⁷¹*Jarrett v. Johnson* (1905), 216 Ill. 212, 74 N. E. 756.

compensation is paid by the trust estate it will be a matter for consideration how far it should be left to the discretion of the trustees to fix their salaries and the periods of employment. It is suggested that, as trustees should make reports on all these matters to the shareholders, their discretion in this regard greatly should not be fettered.

It is for another reason highly important that the trust instrument in the business trust should be specific as to compensation of trustees, because statutes as to compensation contemplate an ordinary trust with income such as rent or interest and not of a trust in business for profits, whose transactions run into enormous sums of money both as to receipts and disbursements. It is certain, however, that even with trusts of the ordinary kind the statute may be displaced by contract between parties *sui juris*,⁷² and so much the more would this be true as to these trusts scarcely within the purview of such statutes.

⁷²*Bowker v. Pierce* (1881), 130 Mass. 262; *Louisville Trust Co. v. Warren* (1902), 23 Ky. L. Rep. 2118, 66 S. W. 644.

CHAPTER XVII.

PROTECTION OF CESTUIS' INTERESTS.

§ 132. *Preliminary.*—Generally, the rights of a *cestui que trust* are only such as are necessary for his protection in securing what is due him from the trust estate. He has no interest in the property itself; and the kind of trust treated in this book seeks to emphasize his lack of control or management. He is a mere *claimant* against the trustee, with a right to follow the trust property. Exceptionally, as in the case of an account stated, he has an action of law against the trustee,¹ but generally his remedy is in equity. We have seen that if the trustee's acts are inconsistent with his duties to the trust he may, at the instance of the *cestui*, be removed.² The rights of the *cestui* to information and accountings, to protection when the trustee is dealing with him and with the trust assets, his right to pledge his shares, and to hold meetings are considered in this chapter.

It is thought that provisions in these trusts for annual reports, for meetings of the *cestuis*, and for periodical selection of trustees is merely an orderly method of doing what every *cestui* has the right to have done. In other words, there is not attempted to confer any new rights, but only to provide efficient machinery for the orderly observance of old rights.

This situation of a business wherein profits go to *cestuis*, who select trustees, keep informed as to their operations, remove them on occasion, and otherwise see that the business results to their benefit, without said *cestuis* being liable for the acts or omissions of trustees, is not unique in law or in common experience. Merely by way of illustration, the position of owner and independent contractor may be instanced. Here the owner gets the benefit, he may remove the contractor, or provide for successive contractors, he sees that the work comes up to specifications and that the contractor performs it honestly, and yet because he exercises no supervision over the contractor's

¹§85, *supra*.

²§§ 85, 118, *supra*.

actual manner of doing the work, he cannot be rendered liable either for the contractor's contracts or torts. This illustration might be carried as a further parallel when the lien against the owner's property is looked to as a basis of credit, just as those dealing with a trust estate may have, as stated by Lord Eldon, "something very like a lien" on the trust estate embarked in trade. The status of trustee and *cestui* as herein expounded is less extreme than that of owner and independent contractor, because the *cestui* is not only divested of control, but he has no legal title to the property dealt with whatsoever.

In order to compare the protection of *cestuis que trust*, and of stockholders in a corporation, with reference to their respective interests, the *status* of corporate stockholders is set forth at length. For brevity the term "stockholders" is used to denote owners of shares in a corporation, and the term "certificate holders" to denote the owners of interests in a trust represented by transferable shares.

§ 133. *Status of Stockholders*.—As a corporation is a creature of statute, it necessarily follows that the methods and limits of its activity, the means of its creation of capital, by whom it shall be managed and how interest therein may be acquired or lost, are also under statutory control. Wherein, however, statute may be wanting in specific provisions, it must be conceded, that courts have applied principles of settled law to the protection of valuable rights acquired in the formation of a corporation. In this sense it has been held that: "The stockholders are the equitable owners of the corporate property,"³ which principle, however, militates in no way against any corporation dealing with that property, within the limits of its charter powers as its own. Nor is there any relationship between a stockholder and a corporation, such as that between a trustee and a *cestui que trust*, which may prevent them dealing with each other as strangers⁴, no one, indeed, having the right to assail transactions

³Martin v. Niagara Falls Paper Mfg. Co. (1890), 122 N. Y. 165, 25 N. E. 303.

⁴Bramblet v. Commonwealth Land & Lumber Co. (1904), 27 Ky. Law Rep. 878, 83 S. W. 599; Moore v. Universal Elevator Co. (1899), 122 Mich. 48, 60; 80 N. W. 1015.

between them except as fraud between the two may have affected either's interests.⁵ No admissions or declarations of one bind the other, except that the stockholder's ultimate rights may be affected in the value of his shares, and notice to one is not notice to the other in any other sense. In a word the stockholder is an individual distinct from the corporation in its contracts and transaction of business. Thus it comes about that whatever may be the character of property to which a corporation has title, a stockholder's interest is personal property,⁶ because as long as the corporation exists it is accountable to its stockholders for no part of any of its property, but only for such profits as it earns from the use of all the property the title to which it owns. When, however, a corporation fails for some reason to attain the object of its creation or by the abuse or transcending of its powers diverts the property vested in it, the beneficiaries of that use may either, under specific provisions of statute or by aid of chancery, divest that title and distribute its former assets, subject to claims the corporation has lawfully created. Equally as distinct, as are stockholders and corporation during its life and fulfilling the purpose of its creation, are stockholders from each other so far as their personal rights and liabilities are concerned. They are not partners in any sense. As incident to stockholding they are given, collectively, certain statutory powers and, severally, other powers against a corporation or its officers. But the strictly fiduciary relation of a corporation to its stockholders may be said to depend either upon its abusing its powers or as that relation may incidentally arise between any two persons otherwise wholly apart one from the other. Thus it has been said: "A well settled qualification of a rule that a corporation does not stand in a fiduciary relation to its shareholders, but that they may deal with each other at arms' length, in the absence of fraud, is that a corporation is a trustee for its shareholders for the purpose of protecting their titles to their shares; and to this end

⁵Great Western Mining & Mfg. Co. v. Harris, 128 Fed. 321, 63 C. C. A. 51, affirmed (1905), 198 U. S. 561.

⁶Cummings v. People (1904), 211 Ill. 392, 71 N. E. 1031.

it is bound to exercise reasonable care and diligence, and is consequently responsible to a shareholder, who has lost his title to his shares through its negligence or misconduct.”⁷ The very fact, however, that a corporation may be held to respond out of its general assets, and thus affect the ultimate interest of every shareholder, for its default as to one or more, emphasizes the complete ownership and distinctive personality of a corporation. This trust principle arises out of the corporation being the custodian of the shares of stock and bound to transfer them when duly directed and not otherwise, it being generally held that the *jus disponendi* as regards corporate shares is absolute. Correlatively there is the right to purchase such shares.⁸

While a default of the kind referred to would affect the interests of all stockholders, it would not seem one for which a trustee would have any right of indemnity against a trust estate, because it is a matter in which other *cestuis* would not be concerned; yet it is not denied that it might be otherwise provided in a trust instrument.⁹

§ 134. *Examination of Books and Papers by Stockholder.*—Statutes provide in varying terms for a stockholder’s right to examine the books and papers of the corporation. Except when they give an absolute right, without question of the motive of examination, they may be deemed declaratory of the common law. The U. S. Supreme Court says of this:¹⁰ “The decisive weight of American authority recognizes the common law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the

⁷ 10 Cyc. 614, citing numerous cases.

⁸ *Pittsburg Library Ass’n. v. Mercantile Library Hall Co.* (1899), 189 Pa. 479, 42 Atl. 142.

⁹ See pages 291, 306, 315, 333 of Exhibits, *infra*, where language seemingly is broad enough to save the trustee harmless from liability for negligence in issuing or transferring certificates.

¹⁰ *Guthrie v. Harkness* (1905), 199 U. S. 148, 26 Sup. Ct. Rep. 4, 50 L. Ed. 130.

corporation of which he is a member * * * The rights of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property. In issuing the writ of mandamus the court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes or to gratify idle curiosity or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes." It has also been ruled, that it must be clear that the purpose is illegitimate before inspection may be refused and the burden is on the custodian of books and papers to prove a wrong purpose.¹¹

§ 135. *Status of Certificate Holders.*—In Chapter XII it has been discussed whether a certificate holder has the ordinary rights and remedies of *cestuis que trust*, suing either singly or in behalf of others, accordingly as he complained of something affecting the trust or only his interest therein. As these certificate holders resemble stockholders, it is conceivable they may have similar rights and remedies, or rather that stockholders have rights similar to those of *cestuis que trust*, especially as we have just seen, that the interest of a stockholder is equitable in some sense; directors are likened to trustees and that the right of a stockholder to an inspection of books and papers is a common-law right, of which statutes securing it are generally but declaratory. The same rule of trusteeship on the part of directors of a corporation has been declared as to directors of an unincorporated company.¹² In this case the trustee seemed merely such of a dry trust and the acts complained of were by directors of the association in their accounts, and it would seem that at least officers of an unincorporated association are held as stringently in an equitable way as directors of a corporation.

But a late case from Illinois¹³ suggests, that an even stricter

¹¹Stone v. Kellogg (1897), 165 Ill. 192, 46 N. E. 222, 59 Am. St. Rep. 240.

¹²In re. Fry (1860), 4 Phila. 129.

¹³Holmes v. McDonald (1907), 226 Ill. 169, 80 N. E. 714.

rule would be enforced against a trustee of an active trust estate. In this case the *cestuis que trust* were not certificate holders, but they were such in effect, because they were merely contributors to a trust fund with their interests measured by their contributions, that is to say, the trust fund was created to earn income payable to subscribers or contributors. The scheme was to form "The Chicago Society for Savings," with membership to be by signing the articles of agreement and making deposits with the trustees who were to manage its affairs. The trustees were to serve "without the expectation of emolument and pledging themselves to an upright and conscientious discharge thereof," and "not to be held responsible for any loss which may happen from whatsoever cause, except their wilful, corrupt misconduct, in which case those trustees only who are present and guilty of such misconduct shall be answerable for the same." Of the eleven trustees only three were active and these were engaged in the banking business. The other eight testified that, while they assisted in creating the Society they took no part in its affairs afterwards, never investigating its securities nor making any attempt to examine its books. The banking business of the three not prospering, they went into that of stock brokerage also. One of the eight advised them to close their banking business. He was told they were closing up the business of the Society and later one of their clerks told him it was closed. As a matter of fact it was closed, except as to three accounts amounting in the aggregate to \$817.50. The matter thus stood until the firm composed of the three active trustees was adjudged bankrupt. The owners of these three accounts sued the eight others for an accounting. The Supreme Court reversed the lower court, holding them "jointly and severally liable to these members of the Society for the amount of their respective deposits."

The court in its opinion adopts the principle stated in Perry on Trusts, (4th Ed.) Sec. 266: "When trustees have accepted the office they ought to bear in mind that the law knows no such person as a passive trustee and that they cannot sleep upon their trust. If such trustee remains quiet for any reason and

suffers some other to do all the business he is answerable for the money, as if he had conducted the business. If a loss occurs from any want of attention, care or diligence in him after his acceptance, he may be held responsible for failure to do that which he ought to do, as well as for his acts of positive misconduct. He must respond in damages for any neglect of duty, express or implied."

The opinion had said just before this, that the settled rule as to directors, and officers of a corporation was that of "ordinary care and prudence," and that they agree to "be liable for gross negligence." Farther on the court pointedly draws a distinction as follows: "In our judgment the duties and responsibilities of the trustee herein partake more of the character of ordinary trustees than of bank directors or any other officer of an incorporated company. * * * Had these men of business sagacity been actively attentive to their duties, they might all have known, long before the failure as to the condition of (this firm) and withdrawn their deposit."

In this case it is perceived, that a rule of stricter responsibility was in the mind of the court than that governing directors of a corporation, and that its application was necessary to enable these *cestuis que trust* to recover.

Considering also that the Illinois Court was construing the ruling of the U. S. Supreme Court, as to the responsibility of one director for the acts of other directors, of a corporation, which could only arise where the wrongful acts of the others were caused by the neglect of a passive director,¹⁴ the Illinois case is especially forceful in presenting the distinction here sought to be emphasized.

Among other language approved in *Briggs v. Spaulding*, *supra*, was that taken from a Pennsylvania case¹⁵ as follows: "We are dealing now with their responsibility to stockholders, not

¹⁴*Briggs v. Spaulding* (1891), 141 U. S. 132, 11 Sup. Ct. Rep. 924, 35 L. Ed. 662.

¹⁵*Spring's Appeal* (1872), 71 Pa. St. 11.

to outside parties creditors or depositors. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. * * * It is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character or responsibility would be found willing to accept such places."

Also, in *Briggs v. Spaulding*, this more emphatic language is approved: "Whatever may be the case with the trustee, a director cannot be held liable for being defrauded; to do so would be intolerable."¹⁶ And this: "One must be very careful in administering the law of joint stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of a company at all. * * * Wilful default no doubt includes the case of a trustee neglecting to sue though he might by suing earlier have recovered a trust fund—in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."¹⁷

In a New Jersey case,¹⁸ the theory of a less stringent responsibility in regard to directors is thus expressed: "These directors serve without pay. They were selected by their fellow stockholders to manage gratuitously the affairs of the association in

¹⁶*Land Credit Company v. Fermoy* (1870), L. R. 5 Ch. Appeal Cases 763, 772.

¹⁷*In re. Forest of Dean Coal Min. Co.* (1878), L. R. 10 Ch. Div. 450, 451.

¹⁸*Citizens' Building Ass'n. v. Coriell* (1881), 34 N. J. Eq. 383.

which they and the other stockholders were jointly interested. To apply to them the strict rules which are applicable to trustees who assume the discharge of the duties of private trusts would be unjust."

In a New York case,¹⁹ cited with approval in *Briggs v. Spaulding*, *supra*, a purchaser of corporate stock relying on a statement in the printed business cards of a corporation of "cash capital \$150,000," when the company neither had or had ever had any such capital, sued one of the directors, whose name appeared on such cards as a director. It was shown that defendant became a director a few months after the organization of the corporation, and that he did not know the representations were untrue, but had no good reason to believe them true and made no inquiries to ascertain their truth, but allowed his name to be used without reflection as to the effect. He was held not liable to the stockholder for his purchase of worthless stock. The opinion pursued the same reasoning as that already shown in extracts, *supra*. It was said: "They (directors) publish their statements and reports, relying upon the facts and figures furnished by such agents," and it was thought that no rule of public policy required directors should be in "constant peril" of others being deceived thereby. It is readily perceived that the trustee of a private trust would not be thus excused.

How differently is the matter in the case of a private trust is well exemplified in English cases. Thus where a *cestui* desired to effect a loan on his income and referred to the trustee for inquiry, a statement was made by the trustee in good faith, but the lender being misled thereby the trustee was made responsible. The court said: "I think it is clearly settled by authority, that when a trustee is applied to for information with regard to incumbrance on his trust fund, and he gives a distinct answer that there is nothing of the sort, the fact that he has forgotten the existence of an incumbrance is no excuse for him whatever."²⁰

¹⁹*Wakeman v. Dalley* (1872), 51 N. Y. 27.

²⁰*Low v. Bouverie* (1891), 3 Ch. 82. See also *In re. Dartnell* (1895), 1 Ch. 474; *Re. Skinner* (1904), 1 Ch. 289.

In a Georgia case,²¹ there is quoted from 2 Spence's Eq. Jur. 921 as a correct statement of a rule the following: "A trustee is bound to render every necessary information that is required of him, and he who, undertaking to give information, gives but half information, in the view of a court of chancery, conceals; if he has not all the information necessary, he is bound to seek first, and if practicable obtain it." The court added to this statement the following: "That concealment *per se* amounts to actual fraud, when, from any reason, one party has the right to expect full communication of the facts from another, is a well settled principle, recognized by both the civil and the moral law."

The duty of a trustee and the right of a *cestui que trust* are well summarized in a Michigan case²² as follows: It was said there were certain rules "so long established both in England and in this country that a departure therefrom has come to be regarded as a want of capacity or dishonesty in a court which fails to apply them." One of these rules "required the trustee at all times to keep his accounts with the several interests belonging to the trust in such manner that he could, when properly called upon, give those who were interested in the estate, the situation of the estate and all the information he could of interest to them during the progress of its settlement; and allow them and their attorneys, who were acting in good faith, opportunities to inspect the books and papers and all records relating to the estate."

A New York case,²³ used the following language as to such duties and rights: "The plaintiff being interested in the property which is to be converted into money and invested for her benefit, she has a right, although the trustee is acting in good faith and is exercising the discretion vested in him wisely and properly, to call upon him from time to time, to disclose to her the nature and character of the property in his hands constituting

²¹Poullain v. Poullain (1886), 76 Ga. 420, 446.

²²Perrin v. Lepper (1888), 72 Mich. 454, 543.

²³Hancox v. Wall (1882), 28 Hun 214, 218.

the trust fund, to show its value, the income derived therefrom and the expenses to which the trustee is subjected in its management.”

Indeed the whole matter appears susceptible of the statement that the policy of the law is not the establishment of the same relation of trust and confidence between a stockholder and a director of a corporation that exists between a trustee and a *cestui que trust*, for were the same high degree of care required of a director as of an ordinary trustee, men of character and responsibility could not be found to fill the office of director. Any such reason for abating from the responsibility of a trustee, however, is repugnant to equity, and if holders of transferable shares seek to establish such a relationship with the managers of the property in which these shares represent interests they have the undoubted right to their choice. But stockholders are limited in this regard by the policy, which creates a corporation. If certificate holders are investors in a trust instead of a corporation, courts will not practically abolish the trust by treating it as a corporation. That would be to make contracts for certificate holders, into which they never entered and to take away rights they would otherwise enjoy.

§ 136. *Relation Between Stockholders of a Corporation and its Managers.*—It should not be deemed necessary to more than formulate, or quote a formulation of, the well-settled rule of a trustee's relationship and duty to his *cestui que trust*. The latter course is pursued in adopting the words of Sanborn, Circuit Judge, as follows: “A trustee or an agent may purchase the trust property directly from his *cestui que trust sui juris* or principal, on the condition, that the latter intends that the former shall buy, that the former discloses to the latter, before the contract is made, every fact he has learned in the fiduciary relation, which is material to the sale, that he exercises the utmost good faith, that no advantage is taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee or agent, and that the entire transaction

is fair and open.”²⁴ This would seem to follow from the cases in the preceding section. That a director or other officer of a corporation is bound to no such strictness in purchasing the shares of another stockholder seems plainly deducible from many cases on this subject.²⁵ Thus it has been said of a director that: “His obligation to the company overrides that, to an individual holder of stock,”²⁶ a principle true perhaps as to a trustee, in the sense that he can discriminate in favor of no single *cestui que trust*, but it is impossible to conceive him having a superior obligation to a trust estate than to *cestuis* as a body. But, if either a director or a trustee may treat stockholders or shareholders severally than as Judge Sanborn states, he may do the same with them collectively. A sum is merely the aggregate of units.

There are a number of cases treating of purchases of stock by directors and managers of corporations from other stockholders, in which the principle of the relation of trustee to *cestui que trust* was invoked to set the sale aside or give to the seller other relief. In some all relief was denied and in one or two only was it granted and then because of special facts. Taking the cases in which relief was denied, as first in order, it is found that they hold that “no relationship of a fiduciary nature exists between a director and a shareholder in a business corporation.”²⁷ One of these cases was decided by the Supreme Court of Indiana.²⁸ It was said there the relation of director was “similar to that of trustees for the shareholders” only “in reference to the management by the directors of the property and general affairs of the corporation,” which state-

²⁴Byrne v. Jones (1908), 159 Fed. 321, 323, 90 C. C. A. 101.

²⁵“Liabilities of Directors and Trustees to Beneficial Owners Compared” (1912), 74 Cent. L. J. 360.

²⁶Oliver v. Oliver (1903), 118 Ga. 362, 368, 45 S. E. 232.

²⁷Strong v. Repide (1909), 213 U. S. 419, 431, stating doctrine of those cases.

²⁸Board of Commissioners v. Reynolds (1873), 44 Ind. 509, 15 Am. Rep. 245.

ment was later approved in the same court²⁹ and a large number of cases were cited in support. The facts of the former case show a county owned about one-ninth of the total stock of a railroad company, that its President purchased it at ninety cents on the dollar without revealing to the seller that he was negotiating a sale of the railroad capitalized at \$250,000 for \$2,500,000; that the sale was effected, thereby making the stock worth eleven hundred per cent more than was paid for it. The court, in ruling that the county was not entitled to have the sale set aside, said: "We have carefully considered the evidence in the cause, and are satisfied that no actual fraud was established in the purchase of the stock by the defendant from the plaintiff. The defendant, doubtless, knew much more about the condition of the affairs of the company and the value of the stock, both present and prospective, than the plaintiff. He purchased the stock greatly below its real value, as subsequent events established, but he paid the market value at the time, so far as it seems to have had a market value. It is not shown by the evidence that there was any special trust or confidence reposed in the defendant by the plaintiff, which was violated by the former, or of which he took advantage." The court does not pretend to say he did not take advantage of the knowledge he acquired as director, when the only way he could buy was to conceal "the value of the stock both present and prospective," a thing Judge Sanborn thought would, in a trustee or agent, be at least, a fraudulent "omission."

This decision was expressly approved in a New Jersey case.³⁰ It was said: "A director or the treasurer of a corporation is not, because of his office, in duty bound to disclose to an individual stockholder before purchasing his stock, that which he may know as to the real condition of the corporation affecting the value of that stock."

The relation between director and stockholder came up in a

²⁹Board of Commissioners v. Lafayette M. & B. R. Co. (1875), 50 Ind. 85, 97.

³⁰Crowell v. Jackson (1891), 53 N. J. L. 656.

New York case, where stock purchased became of greatly increased value by reason of facts not disclosed to the seller, though known to the purchaser, the court said: "It cannot be said that Danforth (the purchaser) was under a legal obligation to say anything about the affairs of the corporation or to disclose any fact or circumstance material on the question of value."³¹ This case has been approved by a late New York case, in which relief was extended to a stockholder, because the corporation was managed by directors in conspiracy to cause a "freeze out" for their advantage. It was said this was an "affirmative act designed to injure."³²

In a case decided by the highest appellate tribunal of New York the unanimous opinion of the court declared: "The relations of trust and fidelity existed between the corporation and directors and not between the latter and the shareholders."³³ As the result of such a principle it was held that, where a corporation in business only one month became financially wrecked by fraud and dishonesty of the President, Secretary and Treasurer, the directors being wholly quiescent, the shareholders had no cause of action against the directors, there being "no proof and no charge of any personal dishonesty against any of the directors, and the negligence found consisting entirely in acts of omission, that is in failing to remove the delinquent officers or in want of proper diligence in ascertaining their unfitness for the positions before they were appointed."

In Michigan it has been said: "Directors, of course, stand in a fiduciary relation to the corporation itself. They do not stand in that relation, however, when dealing with other stockholders for the purchase or sale of stock. In the purchase and sale of stock between stockholders there must be some actual misrepresentation to constitute fraud. Mere silence is not sufficient."³⁴ In this same case it was also said: "An agent may

³¹Carpenter v. Danforth (1868), 52 Barb. 581.

³²Von Au v. Magenheimer (1908), 126 N. Y. App. Div. 257.

³³Bloom v. Nat'l. Sav. & Loan Co. (1897), 152 N. Y. 114.

³⁴Walsh v. Goulden (1902), 130 Mich. 531, 539; 90 N. W. 406.

purchase of his principal, so long as he acts in good faith, and his principal is informed of the situation."

In a Washington case it was said: "The rule recognized and adopted by the modern authorities is tersely stated by a late text writer, speaking of officers of private corporations as follows: 'The doctrine that officers and directors are trustees of the stockholders applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with stockholders or others, though in such dealings they take advantage of knowledge gained through their official position.'"³⁵ This approved doctrine was quoted,³⁶ and many cases are cited in its support.³⁷

Chief Justice Shaw in a leading case³⁸ said: "There is no legal privity, relation or immediate connection between the holders of shares in a bank and the directors of the bank. The directors are not the bailees, the factors, agents or trustees, of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants are responsible," and from this principle have grown up rulings "adopted by the modern authorities" as above formulated.

§ 137. *Cases in Which Directors Were Held Liable to Stockholders.*—The case of *Strong v. Repide*³⁹ came up from the Supreme Court of the Philippine Islands and as the courts below differed in the finding of facts our Supreme Court, under Act of Congress for the Islands, was given the right to review the facts for itself. Upon such review it was held that there

³⁵*O'Neile v. Ternes* (1903), 32 Wash. 528, 541; 73 Pac. 692.

³⁶21 Am. & Eng. Encyc. 898.

³⁷*Gillett v. Bowen*, 23 Fed. 625; *Farmers etc. Bank v. Wesson*, 48 Iowa 336; *Triseoni v. Winship* 43 La. Ann. 45, 26 Am. St. Rep. 175.

³⁸*Smith v. Hurd* (1847), 12 Metc. (Mass.) 371, 384.

³⁹(1909), 213 U. S. 419.

was "strong evidence of fraud on the part of the defendant." This defendant was the holder of the majority of the stock that was about to acquire a greatly increased value through negotiations with this government for the sale of what was called "the friar lands" in the Philippine Islands. He was purchasing other stock and "concealing his identity so he could by such means avoid" inquiry, etc. Summarizing the facts the court said: "If under all these facts he (defendant) purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside or the defendant be cast in damages for fraud. The Supreme Court of the Islands, in holding that there was no fraud in the purchase, said that the responsibility of the directors of a corporation to the individual stockholders did not extend beyond the corporate property actually under the control of the directors; that they did not owe any duty to the members in respect of their individual stock which would prevent them from purchasing the same in the usual manner. While this may in general be true, we think it is not an accurate statement of the case, regard being had to the facts above mentioned."

Here the general rule is admitted of no trust relationship between directors and shareholders, but there was not mere silence but a scheme to avoid disclosure on the part of "the chief negotiator for the sale of all the lands, acting substantially as the agent of the shareholders of his company." In other words, it was the agency relation, placed by Judge Sanborn, *supra*, on the same plane as trust relation, that entitled his principals to relief, and not the relation of director and stockholder.

Judge, now associate Justice, Lamar reviews ⁴⁰ very thoroughly many of the cases above cited and agrees that they are opposed to the conclusions he and his associates reach. He inveighs strongly against such a doctrine as they support. Thus he said: "To say that a director who has been placed where he himself may raise or depress the value of stock, or in a position where he first knows of facts which may produce that re-

⁴⁰Oliver v. Oliver (1903), 118 Ga. 362, 45 S. E. 232.

sult, may take advantage thereof, and buy from or sell to one whom he is directly representing, without making a full disclosure and putting the stockholders on an equality of knowledge as to these facts would offer a premium for faithless silence and give a reward for the suppression of truth. It would sanction concealment by one who is bound to speak and permit him to take advantage of his own wrong—a thing abhorrent to a court of conscience.”

All of this is too true, and it seems a pity that Judge Lamar could call to the support of his views only a short dissenting opinion by one member of the court in *Board of Commissioners v. Reynolds*⁴¹ and its approval by Judge Thompson who said the majority opinion “proceeds upon a conception which, if extended, would sanction nearly all of the fraud and injustice which the managers of corporations have committed against the stockholders.”⁴²

In the second edition of Judge Thompson’s work this excerpt has been elided and it is said: “The officers are not bound to acquaint a stockholder willing to sell his stock with facts which would enhance the price of the stock,”⁴³ and for this a great number of cases are cited and to the contrary three cases⁴⁴ by two different courts.

Stewart v. Harris supra bases itself mainly on *Oliver v. Oliver supra* quoting from it extensively and says the other rule “leaves the stockholders of the corporation the legitimate prey of the managing officers.” *Stewart v. Smith* was a companion case to *Stewart v. Harris*.

§ 138. *Summary*.—With a great array of authority supporting the rule against which Judge Lamar and the Kansas Court,

⁴¹(1873), 44 Ind. 509, 15 Am. Rep. 245.

⁴²3 Thomp. Corp. (1st Ed.) 4034.

⁴³4 Thompson Corp. (2nd Ed.) 4031.

⁴⁴*Oliver v. Oliver, supra*; *Stewart v. Harris* (1904), 69 Kan. 498, 77 Pac. 277, 105 Am. St. Rep. 178, 66 L. R. A. 261; *Stewart v. Smith* (1905), 72 Kan. 77, 82 Pac. 482.

following him alone squarely contend, it may be said that the weight of authority is such, that a legitimate investor in the stock of a corporation takes a heavy risk against the cupidity of its managing officers. Trusteeship in a director even as to the corporation is shown not to be nearly as strict as is that of an agent or ordinary trustee and denied altogether so far as individual stockholders are concerned.

§ 139. *Trustees Selling or Purchasing From or Dealing With the Trust Estate.—Interposition of Third Parties or "Dummies."*—We have seen that there is not an absolute inhibition against a trustee dealing on his own account with his *cestuis* or the trust fund, but it is held that the burden is on the trustee to prove the *bona fides* of any such transaction.⁴⁵ We have seen that this applies to dealings between the *cestui* and trustee in the purchase of property by the trustee from said *cestui*.

All such transactions call for an application of great moral principles which come to us from antiquity and are variously expressed in several maxims, i. e., "No one can be judge in his own cause" (*Nemo debet esse iudex in propria sua causa*), "To be at once the person acting and the person acted upon is impossible." (*Idem agens et patiens esse non potest.*) "The buyer buys for as little as possible, the vendor sells for as much as possible" (*Emptor emit quam minimo potest; venditor vendit quam maximo potest.*) "You cannot serve two masters." "You cannot serve both God and Mammon."⁴⁶

All that this amounts to is that one having an interest opposed to his duty may prefer the former to the latter. Courts of equity, taking into account human frailty, have declared as a rule that fraud is presumed and the burden is upon the trustee to show a transaction fair, when interest and duty conflict. In corporation law, it has been a difficult task to apply satisfactory remedies, and the most that has been done is to disregard corporate entities in some cases of fraud, and to apply the above rule,

⁴⁵Byrne v. Jones (1908), 159 Fed. 321, 323, 90 C. C. A. 101.

⁴⁶Hughes' "Equity in Procedure", §§ 511-522.

by analogy, but, generally, the burden of proof has been upon those injured and, the facts being so peculiarly within the knowledge of defrauding officers, actions for relief often have proven illusory.

The spirit of the rule that you cannot serve two masters is frequently violated as to corporations in various ways. One of these devices is to use "dummies" that is to say, persons acting under no independent judgment but at the dictation of others. By this means properties are taken over by a corporation at the price dictated by the sellers, or valuable interests of a going concern are sold or leased out to an "inside" company, officered by "dummies", whose stock is really owned by the "insiders" controlling a plundered corporation, or some supply corporation is organized with "dummies" to further assist in the making of dividends for the "insiders" at the expense of stockholders, who unwittingly engineer their own loss by placing officers on the "inside" who secretly betray the corporation they represent. Where it is necessary for the "dummy" to hold stock, shares are issued to him, with the certificate therefor indorsed in blank, and left in the keeping of the real parties in interest. The books, of course, show ownership in the "dummy". The real owners practically take no risk from any assertion of independence by the "dummy". His responsibility cuts no figure, indeed the more irresponsible he is the better. He has no hold on his associates. He, usually, gets no dividends on the stock he apparently owns, and his qualification under the statute may be destroyed whenever the holder fills out the blank indorsement and transfers the stock.

How strict is the rule of trusteeship and the burden upon the trustee to show a course of honest conduct is in sharp contrast to this use of dummies. As stated in a great Federal case,⁴⁷ wherein the authorities in England and the United States were exhaustively reviewed: "The rule of equity is in every code of jurisprudence, with which we are acquainted, that a purchase by a trustee or agent of the particular property of

⁴⁷*Michoud v. Girod* (1846), 45 U. S. (4 How.) 503, 553.

which he has the sale, or in which he represents another, whether he has an interest in it or not, *per interpositam personam* (through the interposition of a third person,) carries fraud on the face of it." Hence it is seen that fraud is presumed and the burden of explanation, if any can be made, is upon those best able and justly required to produce it.

§ 140. *Trustee as One of Cestuis.*—While it has been shown that a trustee must act with an eye single to the interests of the trust committed to his charge and that he will not be permitted to take any advantage of knowledge gained by him in the administration of the trust estate in dealing with a *cestui*, yet it has not been supposed, that himself being a *cestui* is opposed to his acting with perfect fidelity to his trust and the consequent benefit of his *co-cestuis*.⁴⁸ Indeed, it has been shown that he may deal with a *cestui*, provided he places him on a full equality with himself as to knowledge, and if he does this, opposition in interest can arise between him and other *cestuis* no more than where an agent deals with his principal as to the subject matter of the agency.

Thus we have seen that courts have recognized that a beneficiary under a testamentary trust may qualify as one of several trustees.⁴⁹ The court said: "Trusts thus constituted are quite common, and although the trustees other than the beneficiary may die or decline to act, the court has power to supply their place or if need be, take upon itself the execution of the trust, so far as it ought not to be executed by the trustee who is also beneficiary." This happened in this case and "the court substituted its own discretion for that of the trustee." *Heard v. March*, *supra*, illustrates that where the acts to be done do not involve the exercise of any discretion to be affected one way or the other by the trustee's personal interest he, though a bene-

⁴⁸*Heard v. March* (1853), 12 Cush. (Mass.) 580. "In promoting the interests of the company they to so great an extent promoted their own," was said of trustees in this case, who owned a majority of the certificates of the trust.

⁴⁹*Rogers v. Rogers* (1888), 111 N. Y. 228.

ficiary, stands precisely like any other trustee. Thus two of three trustees owned three-fourths of the shares and the trust instrument provided that such an interest could direct a sale, the fact of the third trustee not joining in the deed did not invalidate it. It was said, however, that ordinarily the third trustee should have been advised with and consulted or a court of equity would have power to set aside the deed. This case but illustrates the principle, that discretion reposed in trustees must be consulted, unless specific directions as to a particular thing renders this unnecessary. The other case shows, that if personal interest may interfere with that discretion, either the court will step in and substitute its discretion for that of the trustee or other trustees will act for the trust estate.

§ 141. *Information From Trustees.*—It has been shown hereinbefore that the relation of trustee and *cestui que trust* is one of trust and confidence and that the former must always give information, when properly applied to, to the latter about the affairs of the trust. A strong illustration of this duty is shown in a Rhode Island case, where by the terms of the trust the trustee was required to pay over the income to the beneficiary “at such times and in such amounts as may according to the judgment and discretion of the trustee seem best.”⁵⁰ The court said: “The bill sets out no claim which the complainant has upon the respondent, unless it may be the right to be informed of the amount and particulars of the investment of the fund. * * * The discretion of the trustee is not entirely an arbitrary one, but if abused would be corrected by a court of equity. Hence we think the bill may be supported as asking for such an account.” All of which is equivalent to saying, that when the complainant applied for this information it should have been given, because the settlor did not specifically say it need not be given.

There arises, also, out of the fact that the legal title is vested in the trustee the right in the *cestui* to require verification of information by the trustee purporting to be sufficient, a principle

⁵⁰Barbour v. Cummings (1904), 26 R. I. 201, 58 Atl. 660.

illustrated by an English case.⁵¹ This case was brought by one of several *cestuis* in a testamentary trust to compel the trustee under a will to give information as to the amount of consols standing in his name and what stop orders and *distringases* (if any) had been placed thereon and to produce all deeds, papers and documents in his possession relating to property held by him as trustee and to furnish plaintiff with a general account of the estate. The court first granted an order that the trustee should write a letter to the Bank of England to inform the plaintiff as to the amount of consols, and plaintiff afterwards asked for the order to be amended so that information as to stop orders and *distringases* might be obtained. The court said: "The general rule is that the trustee must give information to his *cestui que trust* as to the investment of the trust estate. Where a portion of a trust estate is invested in consols, it is not sufficient for the trustee merely to say that it is so invested, but his *cestui que trust* is entitled to an authority from the trustee to enable him to make proper application to the bank in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which is at the same time incumbered." There was no charge in this case of the trustee having been guilty of any wrong, but there was a suggestion that, inasmuch as the plaintiff owned only one of twelve shares in the trust, he might be getting more information than he was entitled to. It was thought this should not prevent the order being made. This seems a very pertinent case, the question being strictly confined to the trustee giving information, suit being by one *cestui* and no other relief being asked.

The right of inspection by the *cestui que trust* goes even to the production of opinions of counsel procured to guide the trustee in the administration of his trust. Thus, Sir John Romilly, M. R., said: "There can be no question that the rule is, that where the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken by the trustee to guide

⁵¹In *re. Tillott, Lee v. Wilson* (1892), 1 Ch. 86; *Ames' Cases on Trusts* 468.

himself in the administration of the trust and not for his own defense in any litigation against himself, must be produced to the *cestui que trust*. They are taken for the purpose of administration of the trust, and for the benefit of the persons entitled to the trust estate, who will have to pay the expense thereby incurred." 52

This theory in English cases of no other person having any property interest in a trust estate than its beneficiaries and that they are not like wards in chancery whose advice may not be expected in regard to its management, or that they may not ask for other trustees where they may think that management is detrimental to the trust, has support in a great abundance of English decision, and there are also American cases along the same line, as see *Barbour v. Cummings*, *supra*.

In a California case it was said that fraud need not be alleged by, nor that any amount is due to, a *cestui que trust* to entitle him to an accounting. "The very object of an accounting may be, and frequently is, to ascertain how much has been realized and expended, so as to determine whether the *cestui que trust* is entitled to payment."53

A very much more recent decision by this court shows that a trustee upon inquiry before suit was begun refused information to his *cestui que trust* and the court said: "This was not a compliance with his obligation which was to give to his beneficiary complete and satisfactory information of his dealings with the trust estate."54

In Michigan it was said: "The beneficiaries under a trust have the right to be kept informed at all times concerning the management, and it is the duty of the trustees to so inform them. It is not generally presumable that the beneficiaries have such information from independent sources."55 After announcing

52Wynne v. Humberston (1858), 27 Beav. 421.

53Green v. Brooks (1889), 81 Cal. 328.

54Bone v. Hays (1908), 154 Cal. 759, 766, 99 Pac. 172.

55Loud v. Winchester (1883), 52 Mich. 174, 183, 17 N. W. 784.

this principle Judge Campbell further said: "When, therefore, a bill is filed to call trustees to an account, any testimony throwing light on their management bears directly on the performance of this duty, and may be considered in taking the accounts and in determining the view to be taken of the conduct of the trustees." In other words, if a trustee has not at all times kept the *cestuis* informed, presumptively he is at fault and the burden is on him to excuse himself, and, not doing so, this is for consideration in regard to his other acts, and opens the door for proof of misconduct and misappropriation, whether charged in the bill or not.

When this case again came before the Michigan Supreme Court Campbell, then Chief Justice, reiterated what is last quoted above.⁵⁶ The case considered was where a trust was embarked in business.

This same court composed partly of the same bench afterwards animadverted upon the refusal of a trustee to give information to a *cestui que trust* who was "obliged to make resort to the proper courts to compel disclosure of facts which common honesty should have induced the trustee to make voluntarily and with pleasure."⁵⁷

In North Carolina it was said that: "It was one of the principal and most important duties of a trustee that he should keep regular and accurate accounts and that he should be always ready to produce those accounts to his *cestui que trust*."⁵⁸

In Ohio failure by the trustee to consult his *cestui que trust* was instanced, among other things, as showing that his management of the trust estate was arbitrary and unreasonable.⁵⁹

In the District of Columbia Court of Appeals it was said of a trustee that: "It was his duty to keep regular and accurate

⁵⁶Loud v. Winchester (1886), 64 Mich. 23, 30 N. W. 896.

⁵⁷Perrin v. Lepper (1888), 72 Mich. 454, 40 N. W. 859.

⁵⁸Walker v. Sharpe (1874), 71 N. C. 257.

⁵⁹Moeller v. Poland (1909), 80 Oh. St. 418, 441, 89 N. E. 100.

accounts of his trust, and to be ready at all times to render them whenever called for; and this though he might have believed that on a fair statement of accounts he could owe nothing to his principals or *cestuis que trust*," otherwise, "all presumptions are adversely indulged and all obscurities and doubts are to be taken most strongly against him."⁶⁰

The foregoing cases assume that the right of fullest disclosure is inherent in a trust relation and, therefore, it may be fairly urged that to retain it is the retention of a right that vests in the *cestui que trust* just as his interest in the estate is vested. It may be true that a testator or other settlor could deny or qualify that right or a settlor in his own interest could waive it, but where this is not done it remains a right of the same nature as a property right, and if a settlor or a number of settlors creating a trust in their own interests waive it altogether, or as the trustee in his discretion might see fit to make disclosures, this might be important upon an inquiry whether or not a trust in equity in fact had been created. Easily then, it may be inferred, that statute or specific provision in a trust instrument requiring periodical or formal reports is not to be taken as excluding the right to information at other times or as to special matters, but that such statute or provision is cumulative of such right.

§ 142. *Reports Required by Trust Instrument.—Restraints on Right to Information.—Questioning Motive of Inquiry.*—Because of the number of shareholders in the kind of trusts about which this work is particularly concerned, and for the further reason that their residences may make personal inquiry inconvenient, and also because it is desirable that written or printed information of precisely similar tenor should be given to all alike, so one may know of what the others have been informed, it will be seen from the exhibits which are found at the end of this book that reports are required of trustees. As to what is to be embraced in these reports, so as to present the condition of the estate to the shareholders in an intelligible way

⁶⁰Richardson v. Van Auken (1895), 5 App. D. C. 209, 215.

and what should be done in the way of verifying their correctness or obtaining supplementary information, if desired, is a matter best for consideration in the formation of a particular trust. An audit by chartered or certified public accountants is sometimes provided for.

These reports and their form and contents are matters of detail in management, non-observance of which by trustees would be evidence more or less strong of the want of good faith and diligence on their part. Certainly their suggestions of falsity or suppressions of fact would create strong presumptions of fraud and misconduct, and even were such reports fair upon their face any objection by trustees to free inquiry as to their details or any want of fullness in them, so far as the common interests of the shareholders were concerned, *prima facie* would be wrongful. Discretion by trustees in management may be of the amplest nature, but the more ample that is, correspondingly it is expected that the more freely may inquiry extend to every subject to which that discretion applies.

Another use these formal reports subserve is, that they may be guides for shareholders in making such inquiry or investigation as shareholders may desire, and their summaries of affairs may be preferred to synopses of books and accounts, which, though exact, might yet present a very incomplete report of the condition of a trust estate.

Therefore, it may be said, that these reports, instead of being regarded as militating against the right of free inquiry and disclosure, are aids to its better exercise. The right to an accounting, upon a proper showing, with the power to question the trustee generally, and thereby secure that *accidental* evidence which discloses truth in unexpected places, will supplement, when necessary, the *formal* evidence of prepared books or papers.

It is conceivable, that in a trust, where the shareholders because of the absence of partnership liability, are merely investors, as are stockholders in a corporation, especially as shares

are transferred with the same facility as stock in a corporation, the personal relation of trustee and *cestui que trust* is greatly eliminated. It may be thought, therefore, that for the protection of the trust property or of the individual interests of shareholders, but not for other reasons, independent individual inquiry could be restricted. It is clear, that the position of a shareholder ought to extend to nothing except what pertains to his own and the common interests, and, if inquiry at all times without restriction may open the door to abuse and probable detriment to the business of a trust estate, it is in the line of protecting the estate, if reasonable discretion is given the trustees in this regard. It is wholly antagonistic, however, to the trust relation that any discrimination should be shown between *cestuis* as to their right of inquiry, or that trustees should not be obligated to full and free disclosure upon any proper occasion.

In the New York Court of Appeals this question was touched upon in an action to compel the transfer of shares in a trust purchased in the open market, resistance being made upon the ground that the purchase was not *bona fide*, but to further the active opposition of the purchaser as a competitor of the trust, and that by ownership he would be enabled "to vex and harrass" the trust. In other words, the objection was personal to the purchaser.⁶¹ The court, after saying that discretionary power must be reserved in the trust instrument otherwise discrimination cannot be made between *bona fide* purchasers of shares in the open market, thought it did not sufficiently appear that the relief asked "may result oppressively or to the undue prejudice of the" trust.

The relief asked was resisted merely upon the ground of motive of the purchaser in purchasing, a different thing than where as a shareholder he would apply for inspection of books. The court dwells upon the fact that "the shares of the trust were unqualifiedly transferable" in the open market. Upon the

⁶¹Rice v. Rockefeller (1892), 134 N. Y. 174, 31 N. E. 909, 17 L. R. A. 237.

whole, this case supports the view that discrimination shall not be shown between *bona fide* shareholders in any respect and it is not opposed to inspection being kept free of abuse, however, this may be as to the right to interfere with any purchaser, whatever his motive, in purchasing shares in the open market. The case concedes, also, that, had the power been reserved to discriminate as to purchasers, this would be valid. *A fortiori* would it be true that a reserved power to inquire into motives of inspection would be valid.

§ 143. *Using Shares as Collateral Security.*—Taking it that shares represented by certificates are vendible, it follows that they may be used as collateral security for a loan or debt. Interests in a trust, even when not represented by issued shares, that is to say by a certain agreed form of certificate, as conclusive evidence of ownership of a share or shares, have long been used for the purpose of borrowing money.⁶² In this country too it was held that a share represented by a certificate in a syndicate, of which the members were partners, could be accepted as security by a national bank,⁶³ but thereby such a bank could not be made a partner in the syndicate, such being beyond the power of the bank, and even that qualification was dissented from by a strong minority of the court. But this work has proceeded wholly upon the theory, that there is no partnership relation in a voluntary association, under an agreement of trust, where the entire control of the business is in the holder, as trustee, of the legal title, especially where the trust instrument declares, that there is no personal liability and that all persons dealing with the trustee shall be notified, that the trust property alone shall be liable for the contracts of its trustee.

Indeed it may be said, that a lender may, with less fear of being involved in the affairs of the borrower, accept certificates

⁶²Low v. Bouverie (1891), 3 Ch. 82; In re. Dartnell (1895), 1 Ch. 474; In re. Skinner (1904), 1 Ch. 289.

⁶³Merchants' National Bank v. Wehrmann (1906), 202 U. S. 295, 26 Sup. Ct. Rep. 613, 50 L. Ed. 1036.

of shares in a trust estate, than, where, under some circumstances, he might be compromised in accepting corporate shares as collateral. Thus where a national bank accepted as collateral on a loan to its customer shares in another national bank and upon the note falling due and remaining unpaid caused the shares to be transferred to it, in the name of a nominal holder, it became subject to the liabilities of a stockholder of the bank whose shares were thus transferred, that bank having become insolvent.⁶⁴ And it would seem that about the only reason why a similar ruling was not made against another national bank, where, having a claim against a Minnesota corporation, it with other creditors re-organized it and took stock for their debts. This was held a taking of stock in a speculative venture, which was not within the power of a national bank to do,⁶⁵ Justices Brewer and Brown dissenting. It seems plain, however, that if the bank had taken stock in an already organized corporation, as Justice Brewer argues, it would have been subjected to the double liability of the Minnesota statute. The Wehrmann case, *supra*, decides that not even does lending on a share in a partnership and the bank afterwards becoming owner subject it to liability, but this is "simply a transfer of a right to have the property accounted for and receive a share of any balance left after paying the debts."

It appears from decisions submitted, that there is no personal liability of *cestuis que trust*; that third persons are dealt with solely upon express notice that the trust property alone is to be looked to, and, further, that all contracts of trustees, unless trust property is solely made liable, are their personal contracts. It seems, therefore, impossible for any lender upon shares of a trust estate to become involved in any such way as might happen in lending to stockholders in a corporation, but the value or estimated value of shares in a trust, offered as security, needs alone to be considered.

⁶⁴National Bank v. Case (1878), 99 U. S. 628; California Nat'l. Bank v. Kenedy (1897), 167 U. S. 362.

⁶⁵First National Bank v. Converse (1906), 200 U. S. 425.

§ 144. *Meetings of Certificate Holders.—Receipts, Acquittances and Waivers.*—As stated by Lord Colton, in *Smith v. Anderson*,⁶⁶ the shareholders at annual meetings, meet as *cestuis*. Hence it is assumed their deliberations or acts at such meetings will neither in fact nor appearance be those of principals. “They meet to receive reports, appoint auditors and elect new trustees.” The outline of the record of such a meeting is set forth as an exhibit in the back of this book. As a part of such meetings, the minutes may recite the approval or non-approval of the past operations of the trustees and waivers of their rights, so far as disclosed, but as ruled in a great federal case,⁶⁷ receipts and acquittances do not affect *cestuis*’ rights, where “they were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate.”

⁶⁶(1880), 15 Ch. Div. 247.

⁶⁷*Michoud v. Girod* (1846), 4 How. 503, 561.

CHAPTER XVIII.

INVIOABILITY OF TRUST FUND.

§ 145. *Preliminary.*—It has been shown in preceding chapters that the obligations of trustees of active trusts are personal, but this does not mean that creditors or *cestuis que trust* exhaust their remedies in attempts to collect from the trustees. This personal liability, instead of detracting in any way from the creditors' security, enlarges it, leaving unimpaired the principle that property impressed with a trust may be followed by whomsoever is interested in the enforcement of the trust. The many cases hereinbefore cited and discussed, show that both in England and America the trust estate is reached by creditors through the trustees' right of indemnity and it is scarcely disputable but that a creditor, who may subject a trust estate to his debt at all, has a claim superior to that of the *cestuis que trust*.¹

§ 146. *Pursuit by Creditor of Trust Fund.*—That a trust fund may be pursued and rescued from any hands into which it has come with notice of its character, the numberless cases in which *cestuis* have followed and rescued it attest. The principle rests upon wrongful diversion being corrected—a *status quo* being restored. That authority in cases of creditors of a trust pursuing what has been diverted are not so numerous, proves but the lack of incident in this kind of litigation, for, at all events, what is a superior right to that of a *cestui* ought to have at least equality in remedy. But cases are not entirely lacking as to a creditor's remedy against wrongful diversion of trust assets.

The principle of the right of pursuit was impliedly recognized by Putnam, C. J., in holding that stipulation by a trustee for

¹Kuffman v. McGehee (1879), 63 Ga. 250; Rice v. Lane (1896), 166 Mass. 233, 44 N. E. 133.

exemption from personal liability is valid.² The learned judge said: "The entire property of the association was held in trust and therefore subject to administration by the chancery courts, which could apply it equitably and proportionately to the discharge of obligations incurred by the trustee, as contemplated by the express direction of the article of association, that the creditors of the trustees should look for payment solely to its property."

A Pennsylvania case was brought for the express purpose of having a trust estate applied in the very way Judge Putman describes. Thus a testamentary trust was to carry on the businesses of testator. Both the trust estate and the trustee became insolvent. The trustee, while the estate was so insolvent, gave to certain creditors promissory notes with warrants of attorney to confess judgment, and upon these judgments were entered and executions issued. He also made an assignment of all the property of the estate in trust to pay its creditors.³

The court said: "The trust estate is principally liable for the debts contracted upon the faith of it. As it is insolvent, and the trustee, as the master finds, is also insolvent, he became a trustee for its creditors. As such he was bound to protect all their rights and preserve the trust estate for distribution among them according to their respective rights and had no right to give a preference to any of them. The estate being insolvent all of its creditors stood upon an equality and a creditor who has received a judgment for the purpose of liquidating his claim has no right to enforce said judgment by execution to the destruction of the estate or the rights of other creditors."

It was urged that only the *cestuis que trust* could proceed as the creditors were proceeding and that the creditors' only remedy was by an action at law. The court said: "It is claimed that as the relation between the creditors and the trustee is a contractual one, the trustee had a right to give mortgages or con-

²Bank of Topeka v. Eaton (1900), 100 Fed. 8.

³Woddrop v. Weed (1893), 154 Pa. 307, 26 Atl. 375, 35 Am. St. Rep. 832.

fess judgments. Where the estate, however, has become insolvent and the rights of creditors have intervened and the estate should be held intact for distribution, a trustee has no right to confess judgments with intent to prefer creditors by giving them the right to issue execution and sell the property."

The relief sought in a Massachusetts case against a trust estate carrying on a manufacturing business was by creditors to have their claims paid in full out of the trust property, or, in case it was insufficient for all claims to be paid, in pro rata distribution. The bill was held maintainable and also that it was unnecessary that claims should have been first reduced to judgment.⁴

There was no contest in this case except for priority among creditors, and this solely because of a change of trustees. All classification of debts was denied, except as to certain special claims which were expenses of administration of the trust. This case cites a great number of cases which are referred to in note.⁵

These cases establish the proposition, that in no way may a trust estate be gotten beyond the purpose for which it was created. Of course, debts legitimately incurred may be secured by a lien upon trust assets, where the lien is created in the fair operation of a trust estate in business, as a going concern, for this may be in furtherance of the purpose of the trust, but there is no way whereby any preference may be given to any creditor when it becomes insolvent, nor may its assets be free from pursuit when not disposed of in strict execution of the purposes of the trust, nor any charges otherwise raised against a trust or its income.

§ 147. *Corporate Assets as a Trust Fund.*—The trust fund theory as to corporate assets, that is to say, that corporate prop-

⁴Mason v. Pomeroy (1890), 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771.

⁵Ex parte Garland, 10 Ves. 110; Ex parte Richardson, 3 Madd. 138; Burwell v. Mandeville 2, How. 560; Smith v. Ayer, 101 U. S. 320; Jones v. Walker, 103 U. S. 444; Pitkin v. Pitkin, 7 Conn. 307.

erty may be followed by creditors into the hands of any persons having notice of a corporation's insolvency, has been greatly discussed in this country. The doctrine had its origin in 1824 in a case decided by Judge Story,⁶ but that the doctrine has any more extended application than that a corporation must pay its debts before dividing its assets among its stockholders is greatly to be doubted.⁷ This is similar to the idea in regard to a partnership whose assets go in preference to partnership creditors rather than to the partners or their individual creditors. But it has been held that a corporation debtor "does not hold its property in trust or subject to a lien in favor of its creditors in any other sense than does an individual debtor."⁸ For this reason the contention that, if a corporation fails to pursue its rights against third persons, whether arising out of fraud or otherwise, creditors could compel it to do so as being a breach of trust was held not tenable. Also it was held that simple contract creditors could not reach the property of an insolvent corporation, in equity, but must first reduce their claims to judgment. The court further said: "A party may deal with a corporation in respect to its property in the same manner as with an individual owner and with no greater danger of being held to have received into his possession property burdened with a trust or lien." Of course, one dealing with a trustee, if he wishes other security than his personal liability, must look to his authority. If he procures from him property burdened with a trust, it may be followed, and, if a creditor is thus adversely affected, a court of equity does not stop to inquire, if a judgment has been first obtained against the trustee.

§ 148. *Assignments and Preferences by Corporations.*—Corporations unless specially excepted have the same right to assign for the benefit of creditors as has an individual or partnership,⁹

⁶Wood v. Dummer (1824), 3 Mason 308.

⁷Fogg v. Blair (1890), 133 U. S. 534, 541, 10 Sup. Ct. Rep. 338, 33 L. Ed. 721.

⁸Hollins v. Brierfield Coal Co. (1893), 150 U. S. 371, 14 Sup. Ct. Rep. 127, 37 L. Ed. 1113.

⁹4 Cyc. 132 and authorities cited.

and also to prefer particular creditors,¹⁰ but we have seen that such is not the case as to a trust.¹¹

§ 149. *Trust Estates Not Subject to Bankruptcy.*—A trust is scarcely conceivable as a person. It is merely an estate without any capacity contractual or otherwise. As said by Justice Wood:¹² “When a trustee contracts as such, unless he is bound, no one is bound for he has no principal. The trust estate cannot promise, the contract is therefore the personal undertaking of the trustee.” He further shows that a trustee may so contract that the other party is to look solely to the trust estate, but the contracting must be by the trustee who merely places a charge on property. Therefore a trust estate has, in a strict sense, no debts, but may be bound only for debts lawfully created by a proper person.

The United States bankruptcy statute¹³ says: “Any person, except a municipal, railroad, insurance or banking corporation” may become a bankrupt. Thus by naming subjects trust estates are excluded. Indeed it would be somewhat difficult to see how the provisions of the bankruptcy statute could be applied to a trust estate, if it has no contractual capacity. It cannot create a debt and it can give no preference, and a court of equity, as seen,¹⁴ does not permit the trustee to create preferences, but will apply the entire estate equitably and proportionately according to principles of equity jurisprudence.

§ 150. *Unpaid Subscriptions to Shares in a Trust Estate.*—To speak of unpaid subscriptions to shares in a trust estate lacks much of precision in language. To explain that it means the amount or balance contracted to be paid for an interest in a trust estate has something more of definiteness about it. But

¹⁰ 4 Cyc. 166 and authorities cited.

¹¹ Woddrop v. Weed, § 146, *supra*.

¹² Taylor v. Davis (1883), 110 U. S. 330, 335.

¹³ Act of July 1, 1898, as amended in 1903, 1906 and 1910, 36 Stat. et L. 838.

¹⁴ Woddrop v. Weed, *supra*.

even this suggests a transaction out of the ordinary in regard to trust estates. The legal characteristic of a trust is that it is a *corpus* in the custody of a trustee, who holds the legal title with the beneficial estate in others, who are denominated *cestuis que trust*, where, as in such trusts, as this work especially considers, the settlors are the sole *cestuis*, they contract with each other how severally they may acquire that status. If, for example, it were determined that there should exist one thousand interests in a trust estate about to be created, it could be agreed by settlors *inter sese*, that it should be in money or stocks of corporations, bonds, mortgages, negotiable paper, land or any other property, or in part of one and part of others of these things. It competently could be determined that money must be paid by each settlor for an interest in that estate or that he should surrender to it a certain equivalent of money. No one has a right to object, if the settlors themselves are satisfied. But under such arrangement there would be no such thing as unpaid subscription to a trust fund. As to his interest in the trust fund he would be a *cestui*, as to his liability to pay for it he would be a *debtor*, two very different and distinct things as clearly demonstrated in Ames Cases on Trusts. If the equivalent of money, for example, were the promissory note of a settlor, he would own an interest in the trust fund and be liable upon his note. If non-payment of the note worked a forfeiture of the interest, the transaction would be as if it had never been entered into. In either event it would be inaccurate to say there was liability upon a subscriber. This would appear clear if the settlor paid for his interest with the note of a third person, whether the condition of forfeiture attached or not. The subscriber would owe nothing, though the maker of the note does.

But there would be something more of semblance to an unpaid subscription, if settlors, not desiring that the entire fund should be exacted *in limine*, should provide in a trust instrument that instalment payments, or further payments as called for, should be made by the settlors. It would seem clear, that, if the respective interests became their immediate property, they would owe upon promises supported by valuable consid-

erations, just as certainly as one agreeing similarly to pay for a definite interest in land or a chattel. If the vesting was to be postponed or subject to forfeiture, until payment in full is made, still it would be inaccurate, or, at least, not comprehensive, to say there is an unpaid subscription. In the former situation the legal status is more accurately defined as indebtedness in *assumpsit*; in the latter the contract according to its terms might be either an option by the proposed settlor to relinquish all interest in the trust or by the trustee either to claim a forfeiture and annul what has been done or sue upon the settlor's promise to pay the instalments. Thus, in whatever way the matter is viewed, it is seen that it is merely by way of brevity in expression that we speak of unpaid subscriptions, so far, at least as acquiring interests in a trust is concerned.

The lack of complete accuracy in the expression also is apparent when we come to consider how the arrangement of substitutes for immediate payment in money is provided for and is to be completed. Thus the settlors require that the trustee shall take legal title to property, some of which is *choses* in action. Together these constitute the trust fund. The trustee is in no way interested in how the settlors acquire interests in that fund. The law of contract gives them their several interests and the trustee is responsible to them severally as the trust instrument, presently and prospectively, may provide, just as surely as in a testamentary trust the same thing may be determined.

§ 151. *Subscription to Corporate Stock Distinguished.*— This question would need no consideration here but for the circumstance that the creation of a trust for business purposes suggests, that business arrangements, such as are employed in ordinary business, might be resorted to for a gradual accumulation of assets, instead of establishing a completed fund at the beginning, and the evidencing of interests by transferable certificates makes the enterprise take on what resembles a corporate venture. The former of these two circumstances would seem to have been sufficiently considered in what already has been said; the latter needs further consideration, because it is

desired to demonstrate, that decision as to liability of stockholders in a corporation, extreme or lenient as that may be, in no way is applicable to the holders of transferable shares in a trust estate.

In the first place, the writer submits that it has been abundantly shown, that a *cestui* is no less such because the evidence of his interest is in a transferable certificate, and, in the second place, he gets his interest not from the trustee or from the trust estate, but by virtue of the trust instrument. A stockholder in a corporation obtains his title from the corporation and his obligation to it is or may be affected by statute attaching certain consequences to his dealing with the corporation. For example, it needs no authority to show, that, if anyone is indebted either to a trust estate or to a corporation, that indebtedness is an asset, which in case of insolvency creditors should have the right to subject to their demands. It is part of the trust fund, so denominated when a corporation has become insolvent and so of a trust estate, whether solvent or insolvent.

But confusion has arisen, and there is conflict in decision, in corporation cases as to whether or not there is an obligation by a stockholder, where he has paid a corporation less than par but all he agreed to pay for a share of stock, because, it has been contended, the law requires he should have paid no less than par value for that share. Of course, if that contention is true there is an indebtedness which is a trust fund for an insolvent corporation's creditors. This theory is worked out variously, where adhered to at all, as two very interesting articles on what may be called the trust fund theory show.¹⁵ But whether we accept the ruling followed by the New York Court of Appeals in a very recent decision¹⁶ that the trust fund theory has no room for application in the absence of positive statute that

¹⁵XII Yale Law Journal (1902), 67; XIII Yale Law Journal (1903), 66.

¹⁶Southworth v. Morgan (1912), N. Y., 98 N. E. 490; *contra*, McAllister v. American Hospital Ass'n. (1912), (Oregon) 125 Pac. 286.

plainly begets a duty to pay full par value to a corporation, or with the opposite view, the question of what a *cestui* pays for what he acquires under the provisions of a trust instrument is not even remotely affected. Therefore, to discuss the trust fund theory as affecting what a stockholder may or not owe as arising out of his subscription to a purchase of stock in a corporation would be quite foreign to the purpose of this book.

It may be further said, that one may become the holder of an interest in a trust fund by dealing with a trustee, as we may see is provided in copies of trust instruments among exhibits at end of this book, but this arises out of a special power delegated to the trustee and, if the trustee lets in a new *cestui* and covers whatever he pays into the trust fund, he increases trust assets, and, if he pockets what is paid, there is nobody hurt but the other *cestuis*, because a creditor does one of two things—he credits the trustee personally or he relies on the actual and not the supposed assets, and has the right to demand of the trustee full disclosure of their amount and character. Even then he relies on the trustee as to the truth of his disclosure. Therefore whatever may be thought as to subscribing for corporate stock, it must be said there is no rule or statute that may vary an agreement as to interests in a trust estate from intent to create a specific indebtedness thereby, which would constitute an asset of a trust estate, just as a note based on a mortgage in which trust funds are invested is such an asset. Indeed it might be provided, that the purchaser of such an interest could only become such, where he does not pay in money or property, by giving a note, and it would be but business prudence to thus require. If however, partial payment is required and a condition of forfeiture annexed to non-completion of payments, this is a form of security. But when the *cestui* has paid all he has agreed to pay that would end his liability.

§ 152. *Conclusion.*—It seems to the author, that this situation of a trust estate is more attractive to creditors or proposed creditors, than is possible to be obtained under bankruptcy and insolvency statutes, especially the latter, because of their vari-

ance in different jurisdictions, and as to both because of decision working out construction in new developments. Statutes are compelled to be arbitrary in certain ways. Their want of flexibility often works injustice. Equity is equality, and to attain this there is a freer, but not an arbitrary, will in courts in the settlement of equitable estates. Fraud has no fixed statute of limitations to plead against its exposure, and the conscience of a trustee may be more thoroughly probed than these statutes afford the means therefor. To preserve, regain and distribute a trust estate, in accordance with the purpose of a trust, calls for the application of principles, which are universal and well-settled. The struggle by courts to bring corporate assets to the status of a trust fund is one of the finest tributes to the excellence in justice of the theory herein expounded that one might hope to find.

CHAPTER XIX

STIPULATIONS IN INSTRUMENTS ESTABLISHING TRUST ESTATES IN BUSINESS.

Practical Experience—General Directions—Purposes—Name—
Insurance—Temporary Investments.

§ 153. *Practical Experience With Trust Estates as Business Companies.*—It is perceived from cases referred to and discussed in foregoing pages, that the embarking of a trust estate in business has been accomplished in various ways, by will, by deed, for the benefit of others than the settlor and by declaration of trust through agreement between the equitable owners. A trust with interests represented by transferable shares has arisen where originated by will, by a single settlor by deed and by an agreement between all of the owners of original certificates of participation, and provision has been made for acquisition of such certificates by future investors. As to none of these forms has the author discovered any adjudication or principle denying validity of the trust creation, nor any suggestion of provisions, purporting to be found in common-law right, being opposed to public policy. It may be, that some local statute may be thought to be a limitation, more or less, upon the principles endeavored to be presented in this volume, but, if so, its effect will not be here touched upon, because practitioners in the state, where it may be found, ought to be more competent to consider it than the author. The method in the formation of a trust to carry on business in which this volume principally is concerned has been described in Massachusetts, to be: "voluntary associations organized or doing business under written instruments or declarations of trust."¹ An interesting treatment of these associations is found in the report of the tax commissioner of that Commonwealth upon these associations made in January, 1912, to the Senate and House of Representatives of Massachu-

¹Mass. Acts and Resolves, 1911, Ch. 55.

setts along with suggested legislation. He deduces that Massachusetts decision holds them to be partnerships, which the author submits is an erroneous conclusion, where certificate holders are exempt from liability for the contracts of trustees, except merely for the purpose of taxation.² The question of liability of certificate holders has been considered.³

The commissioner shows that the one particularly great growth in these associations was in what is known in Massachusetts as "Real Estate Trusts" caused by the inability of associates to organize a corporation for "buying and selling real estate". The trust form of organization for this purpose, therefore, came into vogue, and it was so attractive to Boston investors that some of them applied it in other states.⁴ How greatly, however, it was adopted in Boston may be appreciated by said tax commissioner approving a statement made that: "The real estate trusts in the City of Boston own, it is estimated, property valued at \$250,000,000," which "afford opportunity for investment in real estate by small as well as large investors, and permit a distribution of such investments among a variety of properties, thus dividing the risk of loss of rent and possible shrinkage of values." The Commissioner thought it could "not be denied that much benefit has resulted to the City of Boston and other places in the improvement of real estate, the addition of property to the tax lists, furnishing accommodations for increasing business and the general promotion of the growth and prosperity of the Commonwealth."

The Commissioner, also, shows that it has been asserted, as the consensus of opinion by investors in these trusts that: "The rights of shareholders, the terms of office of trustees, their compensation, powers, duties, and limitations are more satisfactorily regulated by the terms of the trust agreement, which can be drawn to meet the special needs in each case, than could be possible under the general corporation laws." We think it

²Williams v. Boston (1911), 208 Mass. 500, 94 N. E. 808.

³*Ante*, Chapters X and XI.

⁴Mallory v. Russell (1887), 71 Iowa 102, 60 Am. Rep. 726.

might have been additionally said that there is also an advantage in these agreements containing clauses for amendment so as to make them conform to future conditions.

The popularity of these real estate trusts most probably influenced the application of agreements of trusts, with interests represented by transferable shares, to authorized lines of corporate activity. Therefore "voluntary unincorporated associations for the purpose of carrying on industrial enterprises" were formed in Massachusetts. The Commissioner says that: "In the course of this investigation not more than a dozen of these industrial trusts have been brought to my (his) attention," and "most if not all of them have been reorganized from the corporate form, for the purpose of avoiding publicity of the affairs of a business closely held, for the greater flexibility of management, and to avoid liability for the federal income tax."

As in this chapter we are endeavoring to present the practical side of the business trust, the experience of those who have employed the trust method in business should be noted. The Commissioner says: "The advantages which it is claimed accrue to the industrial and real estate trusts have principally to do with the greater freedom of managing the affairs of the trust. They may be stated generally as follows: 1. These associations have been found by the experience of twenty-five years to be a convenient, safe and unobjectionable method of co-operative ownership and management. They are for the interest alike of the investor and the public. 2. The form of organization ensures a continuity of management and control which appeals strongly to investors in real estate which cannot be secured by a corporation with changing officers. The trustees who are the managing officers of a trust are not so likely to be changed as are the officers of a corporation. 3. It affords a more economical and more convenient and flexible form of management than does a corporation. Trustees can transact business with more ease and rapidity than directors."

The Commissioner, speaking practically of what has appeared

in Massachusetts, argues that though what is claimed may be true, yet experience has been confined to cases where membership has been limited, and there has been something like a close corporation, but he is dubious of equal success for "those associations which seek capital in the open market." He suggests that a stockholder in a corporation may be in a better situation than a certificate holder in a trust, because by statute the former may examine books and records, and annual statements are required. He does not explain, however, why a trust agreement may not provide for the same thing and why a certificate holder may not compel what is provided for. Indeed, it is to be said that such a statute is but declaratory of the common law. He suggests that "the same publicity should be required of voluntary associations whose membership exceeds a certain number, as is required of the affairs of a business corporation."

A third class of voluntary associations under trust agreement, the Commissioner calls "Holding Associations." Of these the author deems it not particularly important to speak. By doing so he would be led into discussion about combination and monopoly and some real or fancied distinction between such associations and corporations for a like purpose. This kind of discussion is foreign to the purpose of this work. At least, however, it may be said, that considering this and the other purposes to which a business trust has been applied, its adaptability may be thought as manifold and varied as legislation may authorize by corporate charters. It may be further said, that the broad principles this volume has been endeavoring to present find their best expression in the consideration of an English case often cited hereinbefore, where it was contended by counsel and denied by the court, that a holding association was a partnership.⁵

Outside of Massachusetts these voluntary associations organized under trust agreement have not greatly appeared, but such as have appeared in judicial decision have been alluded to.

⁵Smith v. Anderson (1880), L. R. 15 Ch. D. 247.

§ 154. *Summary of Situation as Shown by Experience.*—The report of the Massachusetts Commissioner fails altogether to point out, that any serious harm has come to any one from business being conducted by trustees in the interest of owners represented by transferable shares. Rather he is found arguing, that because many real estate trusts say "a corporation would have answered the purpose of the subscribers quite as well as a trust," the objection to corporations for this purpose should "not now be considered a serious bar" to their formation, and he distinctly declines to advise that these trusts should be prohibited, giving as his opinion that this "would be an unwarranted interference with the right of contract, and would raise serious constitutional questions." He does think it would be wise to subject them to further regulation by the state, especially such of them as own, hold or control stocks of public service corporations," alluding here to "Holding Associations."

Therefore it may be confidently said that the business trust is not an experiment. It has no scandal connected with its operation and it is openly asserted that "trustees can transact business with more ease and rapidity than directors." When we add to this practical view, derived from an experience of twenty-five years, that a business trust is a carrying on of a business as a right and not as a privilege, both locally and abroad, that limitations upon the power of its managers may be as strict or as liberal as the owners of that business desire and that these limitations may be enforced according to the principles of equity jurisprudence, its superiority over corporate formation for legitimate business would seem evident. Fraud may lurk in the formation of business trusts, as it lurks in the formation of corporations, but equity has fully as much power to drag it out of hiding, as statute grants, and more to make it restore its unconscionable gains.

It was not in the province of the Commissioner to consider the general constitutional rights of a business trust as compared to those of a statutory corporation, nor the expense of its formation, nor its right to do business at home or abroad. He was

asked to discover, if he might, that the Massachusetts trusts were a detriment to the State or its inhabitants and he found they were not. This report has been dwelt upon, because it keeps us out of the realm of speculation and within the domain of fact.

An article on "The Government and the Corporations"⁶ by Mr. Francis Lynde Stetson of the New York bar speaks of voluntary associations under a trust agreement and personal liability of members being thereby avoided and of their possessing "all the advantages of a corporation excepting existence for an indefinite period, which, however, is impossible only because of statutes, which may be described generally as prohibiting perpetuities." How lacking in seriousness this objection is may be answered by the Massachusetts Commissioner's report and by what has been said *ante*.⁷ But Mr. Stetson also says: "As to ills of corporate management inflicted on the members of the corporation, the derelictions or usurpations of directors, it is to be observed that such ills are such, and such only, as may be practiced by any trustee upon his beneficiary. My own observation is that as to such breaches of trust, the law of corporations and the correction by courts of equity, and criminal courts, are far more specific and comprehensive than usually obtained in cases of personal trust."

This author greatly doubts the correctness of Mr. Stetson's observation, and thinks it must have been confined to ordinary trusts, where opportunity for embezzlement was not safeguarded against. Why, however, careful provisions in trust instruments may not protect beneficiaries of a business trust and dishonesty of trustees not make them amenable to criminal punishment, it is difficult to imagine. The tremendous exactions that are made upon corporations at home and abroad are shown by Mr. Stetson and to escape these legitimately should constitute no small incentive for aggregated capital to adopt the trust agreement method of carrying on business.

⁶Atlantic Monthly, July 1912.

⁷Chapter XIII.

§ 155. *General Directions in Trust Agreements.*—The appendix containing precedents adopted by trusts in active operation is perhaps better for guidance in the matter of prescribing directions for the management of a business trust, than general observations on this subject. There are, however, some general rules of law that ought to be observed.

1. The trust instrument should fix the term of duration of the trust, or its earlier cessation by prescribed action, as say by a vote of two-thirds of its certificate holders. The limit within which this term may continue and its form of expression are referable to local law, as explained.⁸

2. The particular business to be conducted should be stated with enough of precision to notify those who deal with trustees as to the extent of their powers.

3. The instrument, to resolve all doubt as to its creation of a trust, should, along with the vesting of the legal title, commit to the trustees the absolute control of the trust property, with full power to make it answerable for their acts and contracts in the conduct of the business of the trust. Any power of removal or change of trustees should exclude any right to invalidate prior contracts, or repudiate responsibility for prior acts, within the apparent scope of their powers.

4. The particular property of which the trust estate is to consist, in its original form or as afterwards to be invested, should be described so as to admit of ready identification and by apt words the legal title should be vested in the trustees and their successors.

5. The right of trustees to act singly or by a majority or collectively, either generally or specially, should be set forth, and whether or when their contracts should be in writing, or, if oral, what ratification, if any, of a single trustee's acts should be required as a condition precedent to their validity. Also a collective name may seem to be of advantage to a trust. If so,

⁸Chapter XIII, *ante*.

the trust instrument should adopt the name, with such signing and counter-signing as it may seem advisable to prescribe.

6. The trust instrument should vest specifically in the trustees the right to stipulate for personal exemption from liability in the making of contracts, the right of indemnity out of the trust where they may be held personally liable, and the right to pledge the trust property for their contracts and it should contain a clause for exemption of certificate holders from personal liability. It should be provided that all written contracts should contain these features, so as to bring them to the notice of parties contracting with the trustees.

7. The instrument should provide how shares, and the different kind of shares, if any, in a trust are to be issued, their transfer and how evidenced, that they are personal property to pass by succession as other personal property and that the death of a holder shall not affect in any way the continuance of the trust, nor such death give to any person any right for an accounting or partition.

8. Provisions for meetings of shareholders, regular or special, election, removal or change of trustees, filling vacancies, investigation into the affairs of the trust and reports to shareholders, and for amendments of the trust instrument. What right of inquiry a certificate holder should have, of his independent motion, might be thought advisable to be stated, as well as under what circumstances it may be exercised. It is suggested that, if there is a fair reason for independent inquiry by a certificate holder, this could be made plain to a reasonable number of shareholders, who could join in a request and this right thus not become liable to abuse, as has been alleged in regard to the exercise of such right by a stockholder in a corporation. The place of a business should be stated.

9. Care is to be taken that in change of trustees the trust instrument specifically should provide that their successors succeed to the same rights and powers and are subject to the same

duties and liabilities and have like compensation as the former trustees.

10. All instruments of trust should merely by way of caution, make specific provision that in no instance need any one dealing with the trustees have any obligation, either in law or equity, resting upon him to look after the application of any trust funds or property coming into the hands of the trustees. This caution is in view of an old doctrine, about purchasers from trustees seeing to the application of purchase money to purposes of the trust. Such a provision takes away all question as to intent of settlors in this regard.⁹

The provisions above instanced would seem to be reasonably required in any trust instrument, where the interests are represented by transferable shares. What others may seem useful would depend greatly upon the business in contemplation. Also, how great discretion may be committed to the trustees, singly or as a body, keeping always in view that the exercise of discretion is more as between shareholders and trustees, than as limiting their powers as to third persons, must rest always with the creators of a trust.

§ 156. *Unnecessary Detail in Trust Instruments.*—A prime consideration in the framing of trust instruments, after clearly stating the purpose of the trust, is not to restrict so greatly the discretion of trustees as to embarrass its operations as a business concern. A trust in trade stands the hazard of loss, especially, if the holders of the legal title may not conduct its business, generally, as if they also possessed the beneficial interest. The business management ought to be as free as that with which it is in competition. Business risks must be met by business enterprise, and, generally, it might be thought sufficient for the business policy of a trust to be directed by shareholders in an advisory way and by their selection of trustees representative of a declared policy.

⁹Ames Cases on Trusts, 269; 2 Perry on Trusts and Trustees (6th Ed.), Sec. 788 *et seq.*

Nevertheless the provisions in a trust instrument are somewhat tentative and should be subject to amendment as experience may suggest. While, therefore, a trust instrument is the measure of a trustee's power as to third persons, and of his fidelity to the interests of shareholders, yet its susceptibility of amendment puts it upon a higher plane of preference than that of a charter. Neither might it be thought to make its business or investment therein less stable than as regards a corporation, as amendment would not be permitted to affect existing indebtedness and the touchstone of mutual interest ought to presuppose advantage to beneficiaries. What is for their advantage reacts naturally in creating an improved business status. Furthermore, the owners of a trust do their own amending, while legislatures frequently amend charters. Trust owners always have the privilege of prescribing all that a legislature may think appropriate for the management of a corporation, or to vary that for what they may deem better calculated to advance their interests.

Indeed, as corporations are formed under constitutional provisions reserving the right to amend charters, the position of a business trust seems much superior to that of a corporation, the former amending its trust instrument or not, as those interested in the trust may see fit, while stockholders in the latter must accept amendments whether they like them or not.

§ 157. *Purposes of Trust Estates in Business.*—It has been said that: "Every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a trust;"¹⁰ and that: "A trust may be created for any purpose for which a contract may lawfully be made."¹¹ A few states, however, particularly enumerate the lawful purposes of trusts. New York, wherein those involving real property are confined to specified objects¹² is an example of this class.

¹⁰Perry on Trusts and Trustees (6th Edition), Sec. 67.

¹¹Stimson's American Statute Law, Section 1731.

¹²III Cumming & Gilbert's Gen. Laws of N. Y. (1906), p. 3286, § 76.

Trust estates in business have frequently been created in New York as shown by cases coming before the appellate courts, and these, as well as cases from other states illustrate the diversified range of purposes pursued, for example: the manufacture and sale of cotton goods;¹³ holding shares in various submarine cable companies;¹⁴ buying, selling and improving real estate;¹⁵ ownership and disposition of patent rights;¹⁶ operating a wagon factory;¹⁷ a railroad,¹⁸ a store,¹⁹ a general mercantile business,²⁰ a plantation,²¹ a coal mine,²² a general lumber and salt business.²³ These examples are capable of multiplication indefinitely, but, although the nature and number of purposes of trust estates in business may be thought generally to include the entire range of lawful purposes which may actuate any individual in the exercise of his broadest rights to gain a livelihood, still the warning is here given that the statutes of each state should be carefully consulted by local practitioners who are better qualified to pass on this matter than the author of this general work.

§ 158. *Adoption of Name for a Business Trust.*—Strictly speaking it may be said that a trust cannot adopt a name. It has no power to do anything implying either volition or dissent. It is merely property with a characteristic attached to, or inhering in it. But trustees, who represent it, and may charge

¹³Thorn v. DeBreteuil (1904), 179 N. Y. 64, 71 N. E. 470.

¹⁴Smith v. Anderson (1880), 15 Ch. Div. 247.

¹⁵Hart v. Seymour (1893), 147 Ill. 598, 53 N. E. 246.

¹⁶Mayo v. Moritz (1890), 151 Mass. 481, 24 N. E. 1083.

¹⁷Pittsburg Wagon Works' Estate (1903), 204 Pa. 432, 54 Atl. 316.

¹⁸Wright v. Caney River Ry. Co. (1909), 151 N. C. 529, 66 S. E. 588, 19 Am. & Eng. Anno. Cas. 384.

¹⁹Matthews v. Stephenson (1847), 6 Pa. St. (Barr) 496.

²⁰Connally v. Lyons (1891), 82 Tex. 664, 18 S. W. 799, 21 Am. St. Rep. 935.

²¹Hewitt v. Phelps (1881), 105 U. S. 393.

²²In re. Raybould (1900), 1 Ch. 199, 82 L. T. N. S. 46.

²³Loud v. Winchester (1883), 52 Mich. 174.

it, are individuals, *sui juris*, and they may adopt a name or names for transacting business, executing contracts or suing and being sued.²⁴ As the trustees alone contract and their contracts are personal the adoption of a name is by them, though, for the sake of caution, the instrument may so direct. Statutes may put some limitation on the adoption of business names, as is done so far as regards the selection of a name for a corporation, but if they are silent on this subject, it may be said either an artificial name or one that may be applied to a natural person may be chosen, so long as it does not interfere with a trademark or otherwise be deemed unfair competition.²⁵ Out of caution it is suggested, that where statute prescribes for registration of names used for business purposes compliance should be had with its provisions. So where it is forbidden for those unincorporated to use a name implying corporation.²⁶ In such a state the adopted name could have added to it, for example the words "Not Inc." or "Trustees." The adopted name may be protected for the same reason that may prevent its unfair assumption of a name, as above indicated.²⁷ The assumption of a name, therefore, cannot be supposed to have any bearing on the question of personal liability of trustees. All contracts are their contracts and they are personally liable to third parties, unless they stipulate for exemption, but even though they be so liable their right of indemnity is reserved.

§ 159. *Stipulations in Trust Instrument as to Trustee's Contracts.*—As seen,²⁸ courts diligently but with indifferent success, have sought to apply to the workings of corporations what is called "the trust fund theory." This is our ideal of inherent justice. The history of corporations strenuously has called, but often in vain, for its application. That history has shown some-

²⁴Carlisle v. People's Bank (1898), 122 Ala. 446, 26 So. 115; Pease v. Pease (1868), 35 Conn. 131, 95 Am. Dec. 225; England v. New York Pub. Co. (1878), 8 Daly (N. Y.) 375.

²⁵England v. N. Y. Pub. Co. *supra*; 29 Cyc. 270.

²⁶People ex rel. Power v. Rose (1905), 219 Ill. 46, 76 N. E. 42.

²⁷See also Aiello v. Montecalfo (1899), 21 R. I. 496; 44 Atl. 931.

²⁸*Ante* Chapter XVIII.

thing like a vanishing morality. The personality of officials has been obscured. They apply a different rule to their representative acts from what they observe, not only in their purely personal conduct, but also in what they do in any other fiduciary relation. In nothing else, indeed, is there such a reversal of form and fact as in corporate management, in popular opinion, and measurably, in legal effect. Because a corporation is a person and, therefore, may contract and be contracted with, it is forgotten that any person besides it is responsible, *in foro conscientiae*, for its unconscionable acts.

It is difficult, if not practically impossible, for the personality of a trustee to be merged in the trust he represents. The nearest approach to such absorption is when he contracts, as a principal, upon the sole responsibility of the trust estate. This, however, expressly must be stipulated for and, *ipso facto*, he becomes trustee in a two-fold capacity, trustee for the creditor so contracting with him and trustee, as before, for *cestuis que trust*. Therefore his contracts, with exemption from personal liability, impliedly represent, that the trust estate is solvent, and, if the reverse is the fact, a court of equity might disregard the stipulated exemption, at least, if the trustee conceals the fact of insolvency. Certainly it would seem a fraud for a trustee to obtain a release from personal liability under such circumstances, as fraud vitiates all contracts.

It is not meant here to intimate that third persons ordinarily may have a personal action against a trustee, where they agree that he shall not be personally bound, because they are obligated to act as prudent men in making inquiries, but, if they do make them, the trustee is bound to full disclosure and, at all events, not to practice any deception. When a corporation contracts, it is not expected that its agent may be fully informed as to its solvency.

For this and other reasons it has been thought not sufficient in this character of trust, that there only should be direction for express stipulation with third persons for exemption of trustee

from personal liability. There should be a general provision for his indemnity as to any act or contract within his rightful discretion as trustee, for which he might be adjudged personally liable.

§ 160. *Insurance.—Making Trustee Secure Against Personal Loss.*—Insurance of every kind, fire, cyclone, indemnity, or fidelity bonds, add just so much to the credit of the trust estate, as conserving the assets against adverse contingencies. Creditors who have agreed to look only to the trust estate for payment would naturally be interested in their security thus being made “doubly sure”. Where tort or implied contract liability may appear, however, self interest dictates to the trustees a policy of maintaining every class of insurance which will keep intact the trust fund, so that their right of indemnity may be practicably exercised.

The trust instrument may particularly authorize various kinds of insurance, or place it generally within the discretion of trustees. Insurance against tort liability, as now carried by many corporations, is particularly appropriate where the trust is carrying on a business involving these hazards. Bonds from employees may also be considered as particularly desirable.

It is conceivable, that arrangements of this kind are greatly more susceptible of application to a trust in business than to a corporation, and that they foster confidence on the part both of third persons contracting with trustees and of investors in the shares of the trust.

§ 161. *Directions as to Acts by Subordinate Agents.*—The fact of giving to trustees power to manage a business with as uncontrolled discretion, as if they were its real owners, implies that they may adopt the usual means to the attainment of the purpose intended. Nevertheless, if restriction in any way as to this is desired, the trust agreement should provide therefor. Care should be exercised, however, that any limitation on general authority should be clearly expressed, and generally it may be said, that trustees should be directed, where there are several,

to prescribe rules and regulations to be followed by their subordinates and employees. This is a detail in management, and it would rather seem, that it should be left to the trustees. It is to be remembered, always, that trustees are principals and subordinates are their agents, not agents of the trust estate. In their favor is the right of indemnity or not, and, therefore, they should have a free hand in the selection and control of their agents. If they select inefficient agents or do not exercise proper supervision over their acts, the certificate holders have their remedy in a change of trustees, as the trust instrument should provide.

Furthermore, it is suggested that a court of equity more closely would scrutinize the reasons for selection or retention of incompetent or unfaithful agents by trustees, when indemnity for loss on account of their acts or defaults is claimed, than in the case of an officer of a corporation. The burden would be on the trustee to prove his right to indemnity, or, at least, a *prima facie* case or one calling for explanation more readily might be established against him than against a corporate officer.

§ 162. *Temporary Investments by Trustees.*—The question of investments by trustees generally is understood to mean such employment of funds in their hands as would prevent their being unproductive. In a trust embarked in trade the trust instrument naturally contemplates that the entire capital of the trust estate shall be devoted to the protection and prosecution of that business, with the profits therefrom to be distributed, as income from land or securities is distributed.

Therefore, provisions for investment in this character of trust are designed as an aid to the business carried on, with resultant or ultimate benefit to *cestuis que trust*. In other words, it constitutes a detail in the management of the business and subsidiary to its purpose. It might be resorted to, as occasion arose, as the best means temporarily to measure the assets of the trust estate or keep unimpaired its original capital, as well as to enhance the profits of the business itself. It might apply to any reserve the trustees may be directed by the trust instru-

ment to keep on hand against contingencies, or to earnings being accumulated during the intervals of prescribed distribution of profits. It is within the province of trust instruments to direct specially or generally the classes of securities required or preferred as investments, or to leave that to the discretion of the trustees. At all events, the whole subject is comprised within the general purpose of judicious management for the earning of profits and having them ready for distribution at such stated intervals as may be prescribed. It might be said, however, that as some investment might be desired other than the ordinary conduct of the business might require, the constating instrument ought to prescribe in reference to the concurrence of approval by the trustees or a majority thereof. Thus it was provided in the trust deed upheld in *Smith v. Anderson*,²⁹ that between periods of distribution of income, the trustees could make investments in Exchequer Bills or the income deposited in banks at interest.

It is thought that decision regarding investment by trustees of funds not embarked in trade do not pertain very closely to the subject in hand, though it might be thought that a general discretion in trustees to invest primarily for the benefit of a trust estate in trade ought to be exercised under like limitations, as where a trust fund is designed to be kept unimpaired as a *corpus* for remaindermen. In other words this discretion should not be exercised so as to jeopardize, in the least, the success of the business of the trust estate, however attractive an investment might appear to be, if that investment partakes in any way of a speculative venture. To do this would be to elevate an incidental power above the main purpose. Happily, however, this question may be taken out of the domain of controversy by specific direction in trust instruments, but the principle urged might be useful even in the settling of any ambiguities in expression.

How strict the rule in ordinary trusts is against investment in stocks of a speculative character is illustrated by a great

²⁹(1880), 15 Ch. Div. 247.

abundance of decision and statutes generally may be said to be but declaratory of its underlying principles. The formulation of this rule as shown by English cases as this is expressed by a New York Court is as follows: "It may now be regarded as the well-settled rule of the English Court of Chancery that the trustee can only protect himself against risk by investing the trust fund in real or governmental securities."³⁰ The court further said: "The rule established in England has not been abrogated or altered by any legislative action in this state. Nor has it been impaired or affected by the decision of any of our courts, if indeed it could be changed by judicial authority," the latter clause intimating that it is inherent in a trust estate that its *corpus* must be preserved, and to invest it other than safely is to take the risk of waste.³¹ There is a conflict of view among American Courts as to whether the strictness of the English rule should obtain,³² there being a more liberal doctrine applied in some State Courts, but it is scarcely conceivable that the temporary investment of idle funds of a trust estate in business would call for its application, because it is of the essence of the exercise of the power of investment in such a case, that the securities should be as readily usable as the money they represent, and that with a minimum of danger of loss. The language of the Pennsylvania Supreme Court regarding a trustee, who should invest, has additional force in a case where the trustee should provide against not being able to produce the principal at all times it may be needed for business purposes. It was said: "The object of a prudent man was to make money, the duty of the trustee was to take care of it."³³ While the object of a trustee of a trust embarked in trade is to make money, it is also his imperative duty to save it to be invested as prescribed.

While, therefore, it may be thought that statutes should be looked to to guide a trustee in business as limitations on his pow-

³⁰Ackenman v. Emott (1848), 4 Barb. 626, 636.

³¹See also Penn v. Folger (1899), 182 Ill. 76, 55 N. E. 192; Simons v. Oliver (1889), 74 Wis. 633, 43 N. W. 561.

³²Willis v. Braucher (1909), 79 Oh. St. 290, 87 N. E. 185.

³³Hart's Estate (1902), 203 Pa. 480, 53 Atl. 364.

er in temporary investment of its funds, as occasion might arise, yet it would seem they should not be regarded as authority to invest, because such legislation is scarcely to be supposed as having such investments in view. They aim at safe-guarding the *corpus* of an estate, while furthering intent of income therefrom, and preventing its withdrawal from commerce. The capital of a trust in business is ventured along lines wholly outside of statute and investment outside of those lines would be merely incidental. Generally, therefore, it may be thought, that there is no duty upon trustees of a capital embarked in trade to make any use of any part thereof except in that business, and that to tie it or any part of it up, other than in securities readily convertible into money, might be a breach of duty, unless specific authority therefor is contained in the trust instrument. It has been thought advisable, however, to refer to authority regarding ordinary trusts for principles that may, by analogy, be found applicable. The result is that specific provision for investment ought to appear in the trust instrument, though general discretion might embrace it as a detail in management.

CHAPTER XX.

STIPULATIONS IN INSTRUMENTS ESTABLISHING TRUST ESTATES IN BUSINESS.—CONTINUED.

Capital—Shares—Publicity—Incumbrances—Termination of Trust—Recording.

§ 163. *Corporate Capitalization.*—What is seriously thought to be one of the great evils in our age is over-capitalization of corporations. Yet despite it being inveighed against so greatly by economic writers and legislators, statutes for the formation of corporations, instead of curbing overcapitalization, really encourage it. They attempt to confine statement in the charter asked for to a true showing of actual capital, but they allow as to everything but actual money an estimate by corporators or promoters to stand for such actual capital. Such large expenses in the way of corporate organization are permitted, as for example in free stock to promoters and selling original stock below its face value, that very often a corporation begins business with far less of actual capital, than the aggregate of its outstanding shares. Indeed, it suggests financial legerdemain to see corporators swearing they have paid par for stock in a new corporation and the latter selling treasury stock at an extraordinary discount even before it begins operations.

But let it be supposed that statutes are effective to compel a corporation to begin business with its purported capital wholly intact, yet, if that capital becomes impaired by business losses, that fact is not reported. Indeed, the more greatly losses or depreciation has impaired capital, the more industriously is the fact concealed. This is one of the *secrets* of business, of which supposedly the public has no right to be informed, notwithstanding it has every right to know what was its capital when

it began business. And so the public is to be informed when there is a voluntary withdrawal of part of the original capital, statutes generally requiring publication to be made. But how is the public interest subserved by this requirement, if equally it would not be subserved by compelling corporations, whose capital has for any reason become seriously impaired, to publish the fact and forbid the corporation afterwards to claim that its capital remains as it was?

Furthermore, where property other than money originally was or subsequently became its capital, either it increases in value or it decreases. It is barely probable that it remains the same. Indeed in some kinds of corporations, as for example a mining corporation, the very purpose of incorporating is first to develop and then exhaust the capital. Its charter, however, is as unchanging as a law of the Medes and Persians.

Any corporation, whose assets increase, either by earnings held as surplus or by property appreciating in value, promptly takes the public into its widely advertised confidence, and professes to do this often, when that increase is based more on hope than a fair inventory of assets. But, if the reverse is really true, the corporation is overcapitalized, however true and honest was its original capitalization. It is submitted, that what has been recited above as to corporations is well-known to be difficult, if not wholly impossible, completely to rectify by means of statute or any procedure in equity.

It has been urged that not only is this an evil, whereby abuse of charter powers affects others than stockholders in corporations, but it militates against business success by corporations trading under the burden of overcapitalization. It has been said that a corporation will stagger under overcapitalization, because it is so pressed for money to pay dividends, that it neither conserves nor improves its plant, nor installs latest designs in machinery, nor adopts labor-saving and life-saving devices. Certainly its false pretense does not attract loyalty to its management and, indirectly, it encourages graft. It can

never reserve a surplus for emergencies, for faith in it is a minus quantity, and it is on the way to becoming the sport of adverse conditions and relentless competition. It suffers the fate of discovered hypocrisy, showing that even with a soulless thing "Honesty is the best policy."

§ 164. *Capitalization of Trusts in Business.*—It may be that to many it will not be clear, that the substitution of voluntary associations under trust agreements with the like exemption of liability from debts of shareholders, promises any relief from the evils above alluded to. Freely it may be confessed that *cestuis que trust* may set on foot businesses with pretended assets and trustees may be found responsive to an embarkation with bellying canvas too large for safe voyage. Nevertheless, it is certain that honest enterprise has the freest opportunity to shape its intent by appropriate provisions in an agreement creating a trust, and also it is certain that behind that intent there lies not the cheese-paring construction that has been applied to corporate rights, powers and liabilities.

Familiar principles in the law of fraud should deter *cestuis que trust* from participating with trustees in representing that a trust estate embarked in business is a different thing in character or value from what it is represented to be. *In limine* a court of equity would be disposed to hold, that the organization of a different thing than what was purported to be organized scarcely could be deemed the creation of a trust estate. The last analysis of such a conclusion would be that stipulations and provisions and even notices to third persons touching exemptions from liability, in favor either of trustees or *cestuis que trust*, were unavailing, and a joint and several liability would extend to all concerned. It requires no stretch in reasoning to extend this conclusion to trustees alone who, in managing a trust estate merely pledge the trust estate, impliedly or expressly representing it is in value and responsibility what it purports to be. A court of equity would be alert in holding them to the exercise of good faith, and all right of indemnity or insurance against loss might crumble before an adverse finding.

Therefore it seems too risky both for *cestuis que trust* and trustees to organize a trust estate for business except upon the basis of good faith. And it may be further said, that possibly the last thing in the world an irresponsible promoter with a scheme for bonuses and free stock would conceive, as a substitute for a corporation, would be a trust estate controlled by a court of equity.

§ 165. *The Capital of a Trust Estate in Business.*—A trust estate is merely property, the legal title to which is vested in a trustee with the beneficial interest in another or others. It is therefore property committed to trustees, and immediately thereupon the trust relation arises as to it and every part thereof. For it and all of it and for what arises out of it the trustee becomes forthwith responsible. It may be true, that, if specific property other than money constitutes the trust estate, any valuation set upon it might be lawful between the parties, and even a thousand dollars, for example, might be called another amount, but it is easily to be seen, that this opens up a far greater possibility of embarrassment to trustees, who are personally responsible for what they receive, than might arise out of the like way of doing in the formation of a corporation. No prudent responsible trustee would acknowledge to have received one hundred thousand dollars, when as a matter of fact there had been delivered to him fifty thousand. The transaction would be a badge of fraud and every provision of a supposed trust agreement might be vitiated thereby, with the result that trustees and beneficiaries would become jointly and severally liable for all acts and contracts of the former.

We will suppose, then, that the trust agreement provides for a true statement or honest estimate of the value of the property delivered to a trustee to be employed by him as capital in the business intended to be conducted. The creators of the trust may agree among themselves as to the proportions they severally contribute to this capital and in what proportions severally they are interested. Also they may provide how other contributions to the original capital may be made and the contributors become

entitled to proportional interests. In other words, the trust agreement may provide for enlarging the trust capital and increasing the beneficiaries. The reservation of proportional interests by the creators of the trust is as simple a proposition as a testator or other donor embarking a trust in trade for the benefit of several beneficiaries, of which this work has shown several examples, and it is undoubtedly within contractual arrangements to provide for other beneficiaries coming in.

It may be said that to speak of the capital of a trust estate is properly only to speak of its *corpus*, while that of a corporation may be taken to be that, which is the aggregate sum of its shares of stock, whether the assets exceed or are below that sum. Considering a trust estate in business with this distinction and where no others are interested than contributors to its *corpus*, no one but they can object to that *corpus* becoming impaired, unless they be creditors who are injured by misrepresentation by a trustee.

As it is true that it is merely property and nothing else that constitutes a trust estate, it may be misleading to call this capital and interests therein should be expressed proportionately or in aliquot parts, that is to say in shares without "par value." This suggestion has been made as to corporate shares and its appropriateness may seem even clearer as to interests in a trust estate.

§ 166. *Interests or Shares in a Trust Estate.*—As suggested above about defining interests in a trust estate, it is to be further said, that it comports more nearly with the true relation between trustee and *cestui que trust*, that the latter's aliquot part in the property be shown, than that any arbitrary valuation be placed upon it. Every *cestui que trust* has a proportional interest in a thing, whether its value be one amount or another, and he is not supposed to make any representation on that subject, and a trustee's representation would not be of any binding effect upon the *cestui*. It may be thought consistent with the organization of a corporation to speak of par value of shares in capital stock or statute may so require, but for the reasons stated this

seems out of place in defining interests in a trust estate. It is not intimated, however, that the interests could not be expressed as of so much money value, as this would be merely another method of stating an aliquot part.

The real question is whether a trust agreement may provide for shares in a trust estate and evidence thereof in such a way, that they may be transferred as shares of stock in a corporation. In the first place it seems too clear for controversy, that co-owners may agree among themselves, by a competent instrument in writing, what are their respective interests in property, the legal title to which they vest in another. If it is competent for them to convey to him absolutely, it is also competent to apportion among themselves their reserved equity. In the next place it is undoubtedly true that one's interest in a trust estate may be assigned by him to another, as it is property that is subject to levy and sale under process. There being then the *jus disponendi*, it is a mere regulation for the mutual advantage of co-owners to say in advance how the exercise of that right shall be evidenced. As between seller and purchaser this might not be necessary, but that a purchaser might not acquire a status to the possible detriment of the common interest may well be provided for. It will be presumed that it is only by acceding to these regulations that each owner of an interest becomes such.

§ 167. *Preferred Shares in a Trust Estate.*—May there be interests like preferred stock in a corporation? Preferred stock in a corporation is shares, which, while on a higher plane of preference than ordinary shares, yet is secondary in the scale of obligation by a corporation to the claims of its creditors. If, as has been shown, a trustee may contract so as to be bound individually, or to exempt himself from individual liability by pledging the trust property, why may not a trust agreement provide that he may issue shares of stock making the trust estate liable after creditors are paid, just as are corporate assets liable to holders of preferred stock? It is all a matter of contract and, if investors prefer the obligation of a trust estate to

pay interest out of net earnings, rather than to invest in common shares with possibly greater profits, that kind of an investment is just as surely a contribution to trust property, so far as general creditors are concerned, as is investment in ordinary shares.

§ 168. *Publicity of Affairs of a Trust Estate.—Reports—Accountings.*—Publicity has been urged as a means for the prevention of corporate abuses, and generally it may be said that the dominant note in all argument for supervision of corporations is that the public needs this and should apply it either in the exercise of the State's police power or of Congressional power in the regulation of interstate commerce. The rights of creditors are not so much heard of, though bankruptcy and insolvency of corporations fill judicial tribunals with questions that never would have arisen under honest organization and management of corporations, and still less do we hear of the need of protecting the rights of stockholders. That publicity is needed for such rights because secrecy may work to their prejudice is shown by a very recent case in New York, in which the lower appellate court was reversed by the higher.¹

In the lower of these courts it was held, and a number of decisions by the U. S. Supreme Court were cited as authority, that a stockholder, paying for stock, for which he has subscribed, less than its par value, impliedly agrees to become bound to the corporation's creditors to the extent of the difference. The higher court held that where the subscription is to pay less than par, there is no public policy in favor of creditors that the agreement should not be observed. Nevertheless, the corporation is operating under false pretense of having a capital which publicity would show it did not possess. If the lower court was right, creditors should be advised as to corporate assets, and, if the higher court is right, there was a claim of capital which was false.

¹Southworth v. Morgan, 128 N. Y. Supp. 196, 143 App. Div. 648; same case (1912), 205 N. Y. —, 98 N. E. 490.

As said *supra*² it is believed by the author that such a representation would involve both trustee and *cestuis que trust* in a fraud, making them jointly and severally liable. It must be remembered that a corporation may make representations, but a trust estate cannot, and, therefore, when a trustee in conjunction with others or by their express approval makes a false representation, the matter takes on a different phase. It has, apparently, the elements of a conspiracy, and, if the *cestuis que trust* do not participate, it is a personal act wholly outside of the trustee's representative capacity.

Therefore it is to be thought that publicity, at least in the case of numerous *cestuis que trust*, who are changing by the sale and purchase of transferable shares, is a privilege greatly to be appreciated by a prudent trustee. If true reports are made by him, he establishes his good faith in the management of what is confided to him, and admits thereby that such is the measure of his obligation to his *cestuis que trust*.

It may be that for business reasons certain information sometimes should not be spread broadcast, and such limitation upon indiscriminate publicity could be provided for without the trustee keeping it within his exclusive knowledge. In other words, revelation to a standing committee could be made, and their judgment relied on as to its being generally announced. If, however, *cestuis que trust* desire no such limitation on disclosure, the instrument of trust unequivocally may so declare.

It is not attempted here to deny, that the state, within its police power or Congress under the interstate commerce clause, or either, for purpose of revenue, may require specific disclosure. That question it is unnecessary to consider. It is submitted, however, that a trust instrument as to publicity and how far it may go and how it shall be made, is greatly superior to a charter and regulations regarding corporations, because the latter are universal in application, and the former may be framed for a particular business and in accordance with the desires of

²§ 158, *Ante*.

the owners of that business. Where this does not work out practically, amendment may cure defects. The trust relation is severe in holding the trustee to utmost good faith towards *cestuis que trust*, and his personal responsibility to third persons is absolute, except as specifically excepted, but within these limitations there are the usual rights of individuals *sui juris*.

Providing for reports and restraining the right of indiscriminate examination has been treated in § 138 of this book. The absence of specific directions leaves the matter as stated by the Illinois Supreme Court:³

“The fact that the times and manner for accounting for the rents and profits of the trust estate are not fixed, cannot render the trust void. The law will compel the trustee to render accounts in proper manner and at proper times. The absence of specific directions as to when and in what manner the trustee shall render his accounts simply leaves that matter to be determined by construction. If the trustee and *cestui que trust* disagree on that subject, the courts may be resorted to for a settlement of the differences. In such a case, the parties, and, if necessary, the court, would be compelled to take into consideration the nature of the property, how and when the rents and profits will probably accrue, and all other facts and circumstances affecting the question.”

§ 169. *Mortgages by Trustees*.—It would seem not greatly necessary, in view of authority hereinbefore considered, that it should further be urged that a trustee may, when acting within the scope of authority, so contract that a third person may look only to the trust estate for payment. The extent, however, of that authority might be claimed to be his right to charge the trust estate, while providing for his own exemption from liability, in the contemplated management of a trust estate, and that none of the cases cited holds he can raise funds upon the trust property for subsequent use in its management. Besides, we have seen that there is a limitation upon his power to prefer a

³Orr v. Yates (1904), 209 Ill. 222, 239, 70 N. E. 731.

creditor by mortgage when the trust estate has become insolvent,⁴ even though the indebtedness had before that been regularly incurred. And it has been emphasized that such an exemption depends for its validity on the fact that a court of equity will distribute the trust property equitably and proportionally among creditors.⁵

Therefore it would be the exercise of a doubtful power for a trustee to incumber trust property, though embarked in trade, under a general power to exercise his discretion in its management, where the purpose is merely to raise funds, not to discharge present indebtedness, but for the more successful conduct of the business of the trust. An Iowa case goes quite far in expression as to the right of a trustee to mortgage trust property embarked in trade, but the facts of the case show the mortgage was for indebtedness previously incurred.⁶ But it cannot be denied that express power may remove all doubt in this matter. Thus a subscription to a building and loan association by a trustee, as a step toward giving a mortgage on trust property and his executing such mortgage, was upheld under a provision saying that the trustee "for the purpose of managing said trust estate and changing the investment thereof, is hereby authorized at any time, by instrument in writing in which said *cestui* joins during her life, and without her joining after her death, to pledge, mortgage, sell or exchange or otherwise dispose of all or any portion of the real estate and personal property as he may deem best."⁷ And such holding is in clear accord with decision that though a mortgage be unauthorized when exe-

⁴Woddrop v. Weed (1893), 164 Pa. 307, 26 Atl. 375, 35 Am. St. Rep. 832.

⁵Bank of Topeka v. Eaton (1900), 100 Fed. 8; Aff'd. 107 Fed. 1003, 47 C. C. A. 140.

⁶Roberts v. Hale (1904), 124 Iowa 296, 99 N. W. 1075.

⁷Bailie v. Carolina Interstate B. & L. Asso. (1896), 100 Ga. 20, 23 S. E. 274; Cottingham v. Equitable B. & L. Asso. (1902), 114 Ga. 940, 41 S. E. 72.

cuted, yet it is validated by ratification of *cestuis que trust*.⁸ Joinder by *cestui que trust* in a mortgage validates it⁹ and if the trustee is one of the *cestuis que trust* his interest is bound whether the interest of the others is bound or not.¹⁰ It is a universal principle that what one may subsequently ratify he may previously authorize, and *vice versa*.

But while power to borrow money and mortgage trust property might be implied as being a proper and necessary means of executing the purposes of a trust,¹¹ yet each case under such ruling depends upon its own circumstances and the only prudent thing to do, if it is desired, that a trustee may have power to borrow and mortgage, is for a trust instrument specifically to provide that he may and the circumstances under which the power may be exercised.

As this is a power expressly or impliedly to be granted, the conditions of its exercise may be stated as fully as desired. For example, the trustee's power in this special regard might be declared to be exercisable only upon a resolution passed by a majority of shareholders present at some regular or special meeting or upon approval of some standing committee of the shareholders.

Accordingly as the trust instrument specifically may give to the trustee the right to encumber trust property to raise money either to pay off indebtedness or to create a fund for business operations, prudently it may provide for any temporary exigency or for the creation of a bonded indebtedness extending over several years.

⁸Boon v. Hall (1902), 78 N. Y. Supp. 557, 76 N. Y. App. Div. 520; Magraw v. Pennock (1853), 2 Grant (Pa.) 89.

⁹Fonda v. Gibbs (1903), 75 Vt. 406, 56 Atl. 91.

¹⁰Sternfels v. Watson (1905), 139 Fed. 505.

¹¹Rogers v. Rogers (1888), 111 N. Y. 228, 18 N. E. 636; Christian v. Worsham (1883), 78 Va. 100; In re. Stevenson (1898), 186 Pa. 262, 40 Art. 473. See also Townsend v. Wilson (1904), 77 Conn. 411, 59 Atl. 417.

§ 170. *Amending Trust Agreements.*—To amend a trust agreement means, that the trust continues under the original agreement for the term therein fixed. Therefore all provisions for amendment contemplate that the essential rights of the equitable owners remain unimpaired. The fact, that amendments require for their adoption a proportion of the votes of the entire number, instead of the entire number, implies this kind of construction. The most numerous of cases presenting illustrations of this are those which concern fraternal insurance societies, whose constitutions and by-laws, applications for insurance and benefit certificates are conditioned upon an assured being bound as such constitutions and by-laws exist or may be amended thereafter. This broad language has been held not to extend beyond reasonable amendments which pertain to the management of these societies and not as impairing the contract of the assured.¹² What are the inherent rights of a *cestui que trust* as distinguished from mere management of the business of the trust estate ought to be easily recognized. There are the property right and the right of full and free disclosure by the trustee and the equitable rule that, while the trustee may bargain with the *cestui que trust* he can take no advantage of him by misrepresentation or any concealment of what it is his interest to be informed, and that by amendment no rule of law in the formation or continuance of the trust shall be violated.

§ 171. *Voluntary Termination of a Trust Estate.*—It is considered that it is not further necessary to speak of what steps should be taken in the event a trust estate becomes insolvent, as the cases discussed show, that a court of equity will take charge of its assets and distribute them equitably and proportionally among creditors and dispose of any surplus among its equitable owners.

¹²*Lange v. Royal Highlanders* (1905), 75 Neb. 188, 106 N. W. 224, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786; *O'Neill v. Sup. Council A. L. H.* (1904), 70 N. J. L. 410, 57 Atl. 463; *Bragaw v. Sup. Lodge K. & L. H.* (1901), 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602; *Thibert v. Sup. Lodge K. H.* (1899), 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412.

Therefore it is intended here to refer merely to the termination of the trust. We have seen that an express trust may have a term and for its validity that term should be stated to be one within a time not forbidden by statute. This, however, does not require that it can not be terminated earlier. And when a trust is terminated this does not mean that immediately the entire relation of trustee and *cestui que trust* is at an end, but it continues until a final settlement is had.¹³ It is conceived, therefore, that it would not be in violation of the rule against perpetuities for the trust instrument to provide that upon the termination of the trust, the assets thereof shall be forthwith converted into money and the proceeds distributed among the then existing shareholders at the earliest practicable moment. This question, however, could be wholly avoided in those states where trust terms may be stated to be upon a certain number of years, New York and a few other states being exceptions where a life or lives fixes the duration. However it is so repugnant to every sense of justice to suppose that a trustee would not have to account after the trust term had ended, that there can be no plausible claim to that effect. Where there exists at all times full power of revocation, we have seen that the rule against perpetuities is not offended, if no trust term is stated.^{13a}

Trust instruments of the character considered in this work should contain provisions for the trust term being cut off by action taken by the *cestuis que trust*, should they so desire. This may be done by its being provided, that a certain proportion of the holders of shares may at a regular or special meeting, called upon a specified kind of notice, by resolution declare that the trust shall terminate and its affairs be disposed of by a certain date, or as soon thereafter as may be practicable.^{13b}

¹³Payne v. Bowdrie (1900), 110 Ga. 549, 36 S. E. 89; Tabernacle Baptist Church v. Fifth Ave. Baptist Church (1901), 60 N. Y. App. Div. 327, 70 N. Y. Supp. 181; same case, 172 N. Y. 598, 64 N. E. 1126.

^{13a} § 92.

^{13b}Howe v. Morse, 174 Mass. 491, 55 N. E. 213.

Provisions for continuance of a stated trust term have been discussed in §§ 96 and 97, *ante*. Under the view that the trusts created by the instruments, of which copies appear in appendix to this volume, are not subject to the rule against restraints upon alienation, the provisions for continuance found therein would seem to be valid. To such however, as may be of a contrary view and deem those trusts subject to such rule, the writer is disposed to advise the omission of any clause, providing for the continuance of the trust after the period fixed and upon consent of a part only of the *cestuis*.

§ 172. *Recording.—Actual and Constructive Notice.*—"Generally the provisions for recording deeds apply to instruments creating a trust."¹⁴ Massachusetts, however, has an additional provision applicable to "voluntary associations under written instrument or declaration of trust" requiring the filing of the deed of trust with the commissioner of corporations,¹⁵ and "with the clerk of every city or town in which such association has a usual place of business."¹⁵ The recording of fictitious names assumed by trustees as a business title is also provided for in that state.¹⁶

It is not contemplated, however, that the recording of the constating instrument of a trust estate in business, will operate as constructive notice that liabilities are limited. *Actual* notice is provided for.

It is submitted that those who establish a trust estate should welcome the opportunity of placing the instrument where it may be freely inspected by those interested. Merely keeping the original on file in the company's office, without official recording, should this be permissible in any state, might give some color to a possible claim that those in control as trustees were not permitting free access thereto. Moreover, official recording permits the securing of certified copies, with a consequent import

¹⁴Stimson's American Statute Law, § 1711.

¹⁵Acts of Mass. 1909, Ch. 441. Statute 1907, Chapter 539.

¹⁶Acts of Mass. 1907, Chap. 539.

of verity, and forestalls any serious difficulties arising from loss of the original. Besides, recording affords an easy and convenient mode of reference to the trust instrument as to stipulations by a trustee exempting himself from personal liability and making the trust estate solely responsible for his contracts. In such case it becomes the duty of the creditor to inform himself of the powers of the trustee.¹⁷

¹⁷Bank of Topeka v. Eaton (1900), 100 Fed. 8.

APPENDIX OF EXHIBITS.

One of the thoughts upon which the writer has endeavored to lay some stress in the foregoing pages is that provisions in trust instruments for the carrying on of business are, after the trust estate is provided for, susceptible of the widest diversity. Corporate articles are stretched upon a Procrustean bed, which a legislature only may lengthen or lop off. The truth of these statements is in the logic of a corporation being an artificial being and in the trust being a natural person's right of contract.

The variety of trust arrangements, which appear in copies of original agreements, which in this appendix are called "Exhibits", are therefore not to be used as forms, in the popular import of that word, but rather as guides, to prevent omission in what ought to be embraced in such an instrument and as suggestions in phraseology to accomplish a desired end. But they may no more be slavishly followed than might the terms in a particular contract when a different purpose is in view or different means are preferred for its performance. As important contracts need skill in their drafting, so does this character of instrument.

Nevertheless these precedents should be of great value, because they are supposedly the result of mature consideration, as, in a sense, pioneers in their method of aggregating small investments to be employed after the manner of corporations. We say these exhibits are pioneers, but it is submitted that the principles they are based on are not only old but they have constitutional guaranties behind them.

It will be interesting to study the variety of provisions in these exhibits and admire the expansibility of the principles upon which they are based, if it is true that they are not inconsistent with these principles, in fact, or as developed in the pages of

EXPLANATION OF EXHIBITS.

this work. It also may be suggested that as litigation hereafter may challenge the validity or construction of any terms or provisions of any of these instruments, opportunity to consult them in their entirety and compare them with each other might not be amiss. Particular provisions may be located by means of the index at the end of the book.

FORM OF DECLARATION OF TRUST ESTABLISHING A REAL ESTATE
COMPANY.

AN AGREEMENT AND DECLARATION OF TRUST made by the subscribers, this 14th day of April, 1894, for the purpose of purchasing certain real estate known as the Tremont House Estate and an adjoining property situated on Tremont and Beacon Streets and Tremont Place, in Boston.

1. The trustees under this agreement are authorized as such trustees to purchase said estates and any existing leases thereto, and to proceed to the erection of a new building as soon as practicable, and may as such trustees make all necessary contracts and agreements for such purchase and for such new building, including any agreement they may think advisable for straightening or altering boundaries, and may if they deem expedient for the adjustment of boundaries acquire additional adjoining estates or release portions of the trust estate, and may make leases of the property or any part thereof held by them on such terms as they may think best, but they shall make no lease for a term of more than five years or for an annual rent of more than \$10,000, unless authorized by vote of the shareholders, except that they may make a lease of certain portions of said building to one tenant for the term of not more than twenty years and at an annual rental of not less than \$24,500. After the new building is completed the trustees shall incur no debt or liability except such as may be incidental to the management of the property held by them, and then only for an amount not exceeding in the aggregate at any one time \$20,000. The trustees shall have no power to bind the shareholders personally (and in every written contract they shall enter into reference shall be made to this declaration of trust), and the person or corporation contracting with the trustees shall

EXHIBITS.

look to the funds and property of the trust for the payment under such contract or for the payment of any debt, mortgage, judgment, or decree, or of any money that may otherwise become due or payable by reason of the failure on the part of said trustees to perform such contracts in whole or any part, and neither the trustees nor the shareholders present or future in this company shall be personally liable therefor.

2. The title of the trustees shall be "Trustees of the Tremont Building," and any property conveyed to them under that description shall be held by them in trust under this agreement.

3. The trustees shall give receipts for installments on subscriptions when paid, and on the payment of the last installment shall issue certificates in exchange for such receipts in shares of \$100.00 each for each \$100.00 paid. Such receipts and certificates shall be transferable only on the books of the trustees upon surrender thereof, all installments due having first been paid and the acceptance of a receipt or certificate shall make the person named therein a party to this agreement. The term "shareholder" used in this agreement shall mean holder of record of a receipt or a certificate.

4. Interest at the rate of 4 per cent per annum and all taxes and assessments shall be added to the cost of the building and paid semi-annually to the subscribers from the date of their respective payments of subscriptions until the substantial completion of said building. The cost of said building shall also include 1 per cent on the amount of subscriptions procured by Alexander S. Porter and T. Dennie Boardman (which shall be paid to them for their services and expenses in promoting this enterprise and procuring subscriptions to this agreement) and also 1 per cent on the gross amount of rental on any lease negotiated by them of the lower floor and basement of said building, and also a reasonable compensation to be paid the trustees for their services rendered during construction

REAL ESTATE TRUST.

5. The trustees shall have a reasonable compensation after construction of building, and shall make such dividends among the shareholders as they may deem expedient.

6. The trustees shall call meetings of the shareholders annually on the third Wednesday of March, and shall report their receipts and expenses for the year ending on the 31st of January preceding. They may call special meetings of the shareholders at any time, and shall do so upon the written request of the holders of one-twentieth of the shares.

7. Notices of meetings, of calls for payments of subscriptions, or for any other purpose, shall be deemed binding upon each subscriber and shareholder if mailed prepaid to the last address given by him to the trustees, or in default thereof, to his last given place of business or abode. Notices of meetings shall be given seven days beforehand, and may be given by advertisement for three successive days in two daily papers published in said Boston, or by mail, at the option of the trustees. In notices of special meetings the purpose therefor shall be stated.

8. Shareholders may vote by proxy. At any annual meeting or special meeting called for the purpose the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees, may depose any or all of the trustees and elect others in their place, may authorize a sale or mortgage of the real estate or any part thereof held by trustees, and may alter or amend this agreement. For all other purposes a majority of those shareholders present may decide at such meetings, and ten shareholders or their proxies representing one-fifth of all the shares shall constitute a quorum. No such alteration or amendment of this agreement or deposition or appointment of trustee shall affect any person not having actual notice thereof until recorded in Registry of Deeds for Suffolk County, nor shall any such alteration or amendment or other action affect rights (previously acquired) of any third person. A certificate signed by the chairman of such meeting shall, if countersigned by at least one of the trustees, be conclusive evidence of the regularity of the meeting and of the vote having been passed

EXHIBITS.

by the requisite majority and of all facts stated in such vote or certificate material to title.

9. Any vacancy in the number of trustees may be filled by the remaining trustee until the next annual meeting of the shareholders or special meeting called for the purpose of filling such vacancy. The acting trustee or trustees from time to time shall have all the powers of original trustees. Upon resignation, decease, incapacity, or removal, or vacancy for any cause, the title of the outgoing trustee shall rest in the remaining trustee, and upon the filling of any vacancy by the shareholders as aforesaid the title of the whole trust property shall rest in the new board jointly.

10. No sale or mortgage of the real estate held by the trustees, or any part thereof, shall be made by them unless authorized by vote of the shareholders as provided above, except that the trustees may sell all the trust property at the expiration of the trust in default of action relative thereto by the shareholders.

11. This trust shall not continue in any event longer than twenty years after the death of the last surviving subscriber hereto. The trustees shall not be required to give bond, and each shall be liable only for his own acts, and then only for wilful breach of trust.

12. Any certificate or paper signed by the trustees or any of them or by the shareholders, or a copy of the record of any of their proceedings certified by any one of the trustees which it may be deemed desirable to record in the Registry of Deeds for the County of Suffolk, may be acknowledged by any one of the trustees or parties signing in the manner prescribed for the acknowledgment of deeds in Massachusetts.

13. We the subscribers agree to pay to the trustees the amounts stated against our names, in such sums and at such times as the trustees may require, and in case any subscriber neglects to pay any installment required by the trustees in

REAL ESTATE TRUST.

twenty days after notice, the amount of his subscription then unpaid may be canceled at the option of the trustees, who may accept another subscriber in his place.

14. The limit of subscriptions hereto shall be the sum of \$2,700,000, and no subscription shall be binding until the total amount reaches the sum of \$1,400,000. It being understood that the remaining \$1,300,000 is to be raised by a mortgage of the said real estate.

15. The first trustees under this agreement shall be Charles E. Cotting and Francis C. Welch, both of said Boston, who signify their acceptance of the trust by subscribing their names thereto. No surety or sureties shall have to be required of any trustee acting hereunder.

CHARLES E. COTTING,
FRANCIS C. WELCH,
Trustees.

<i>Name.</i>	<i>Amount.</i>	<i>Name.</i>	<i>Amount.</i>
Estate of Fred L.			
Ames, by Oliver			
Ames 2d, Samuel			
Carr, Exca.....	\$200,000	H. H. Hunnewell...	\$200,000
B. P. Cheney, By B.		Henry Lee.....	100,000
P. Cheney, Jr., At-		David Sears.....	50,000
torney	200,000	Grant Walker.....	60,000
		Etc., etc.	

I, Andrew C. Wheelwright, hereby certify that I was the Chairman of a Special Meeting of the shareholders of the Tremont Building Trust under an Agreement and Declaration of Trust made April 14th, 1894, and recorded with Suffolk Deeds, lib. 2212, Page 210, duly called for the purpose and held at Boston on Tuesday the fifth day of March, A. D. 1901, and that at said meeting the holders of a majority of the entire number of shares passed the following vote, amending said Agreement and Declaration of Trust.

EXHIBITS.

VOTED: That the Agreement and Declaration of Trust dated April 14th, 1894, and recorded with Suffolk Deeds, lib. 2212, Page 210, be and the same hereby is altered and amended as follows: The Trustees under said agreement are authorized to purchase the estate on the westerly corner of Beacon Street and Tremont Place, in Boston, now belonging to Walter J. Otis and numbered six on said Beacon Street, and one and three on said Tremont Place, also the adjoining estate on said Tremont Place now belonging to Isidore B. Raggiotti and numbered five on said Tremont Place, containing together about four thousand, eight hundred and sixty-five square feet, and any existing leases and mortgages thereon, and to proceed to erect thereon a "building of the first class," said real estate when so purchased to be held by the said trustees upon the trusts set forth in said agreement and with the same powers in all respects as if the same had been included within the scope of the original trust, and upon the completion of such building or at any time thereafter said trustees are authorized to issue from time to time such additional stock on such terms as to them shall seem best to pay for said land, the cancellation of leases and mortgages and the construction of such building and any incidental expenses connected therewith.

I further certify that at said meeting the holders of a majority of the entire number of shares passed the following vote:

VOTED: To provide means of paying for the land situated on the westerly corner of Beacon Street and Tremont Place, numbered six on Beacon Street and one, three, and five on Tremont Place, containing together about four thousand, eight hundred and sixty-five square feet, the cancellation of leases, the discharge of mortgages, and the erection of a building thereon; the trustees are authorized to borrow from time to time such money as in their opinion is necessary for those purposes, and to give the notes or obligations of the

TRUST AMENDMENT.

trustees therefor on such time and bearing interest at such rate as to the trustees shall seem best, which notes shall be enforceable against any property now or hereafter held under the agreement of trust, and to secure payment for such notes or obligations by giving a power of sale, mortgage or mortgages in such form as they may deem expedient covering said land and buildings. No mortgagee, however, to be under any obligation to see to the application of the money lent.

Witness my hand this 30th day of March, A. D. 1901.

ANDREW C. WHEELWRIGHT.

Countersigned:—

CHARLES E. COTTING,

FRANCIS C. WELCH,

Trustees of Tremont Building,

Under an Agreement and Declaration of
Trust made April 14th, 1894, and re-
corded with Suffolk Deeds, lib. 2212,
Page 210.

Commonwealth of Massachusetts, }
Suffolk. } ss.

Then personally appeared the above named Charles E. Cotting and Francis C. Welch, and acknowledged the foregoing instrument by them subscribed to be their free act and deed as Trustees.

Before me,

ERNEST DANE,

Recorded:—

Justice of the Peace.

April 2d, 1901, one o'clock and
twenty-eight minutes P. M.

FORM OF DECLARATION OF TRUST ESTABLISHING A HOLDING
COMPANY.

Agreement and
Declaration of Trust of the
MASSACHUSETTS ELECTRIC COMPANIES.

Dated: June 29th, 1899.

THIS AGREEMENT, made this twenty-ninth day of June, A. D. 1899, by and between E. Rollins Morse, Henry Russell Shaw, Robert W. Emmons, 2d, and George W. Parker, co-partners under the firm name of E. Rollins Morse and Brother, and William A. Tucker, S. Reed Anthony, Philip L. Saltonstall and Nathan Anthony, co-partners under the firm name of Tucker, Anthony and Company, together with their assigns, herein designated as the "SUBSCRIBERS," and Gordon Abbott, Charles Francis Adams, 2d, S. Reed Anthony, John N. Beckley, Amos F. Breed, Everett W. Burdett, Charles E. Cotting, Eugene N. Foss, Walter Hunnewell, Stillman F. Kelley, E. Rollins Morse, Richard Olney, Percy Parker, S. Endicott Peabody, and Philip L. Saltonstall, together with their successors, herein designated as the "TRUSTEES," witnesseth:

That

WHEREAS the subscribers propose to transfer, assign, and deliver to the Trustees, under the designation of "MASSACHUSETTS ELECTRIC COMPANIES," certain shares of the capital stock and other securities of sundry street railways and other companies and contracts to purchase the same and also other property, as shown in a schedule identified by the signatures of the parties hereto and filed with the Trustees; and the Trustees for the purpose of defining the interests of the subscribers and their assigns in such property, have agreed

HOLDING TRUST.

to issue to the Subscribers negotiable certificates for two hundred and forty thousand (240,000) shares, of which one hundred and twenty thousand (120,000) shall be preferred and one hundred and twenty thousand (120,000) shall be common, each share to be expressed of the par value of one hundred (100) dollars, and all of said shares to be issued to the Subscribers in the following proportions, viz:

To said E. Rollins Morse and Brother, or order, 60,000 preferred shares and 60,000 common shares; to said Tucker, Anthony & Company, or order, 60,000 preferred shares and 60,000 common shares.

NOW, THEREFORE, the Trustees hereby declare that they will hold said property so to be transferred to them, as well as all other property which they may acquire as such Trustees, together with the proceeds thereof, in trust, to manage and dispose of the same for the benefit of the holders from time to time, of the certificates of shares issued hereunder, according to the priorities expressed in said certificates, and in the manner and subject to the stipulations herein contained, to-wit:

FIRST. The Trustees, in their collective capacity, shall be designated, so far as practicable, as the "MASSACHUSETTS ELECTRIC COMPANIES," and under that name shall, so far as practicable, conduct all business and execute all instruments in writing, in performance of their trust.

SECOND. The Trustees shall always be fifteen in number, and of the Trustees herein mentioned by name, S. Reed Anthony, Everett W. Burdett, E. Rollins Morse, S. Endicott Peabody, and Philip L. Saltonstall, shall hold office until the first annual meeting of the shareholders; Gordon Abbott, John N. Beckley, Amos F. Breed, Walter Hunnewell, and Stillman F. Kelley, shall hold office until the second annual meeting of the shareholders; and Charles Francis Adams, 2d, Charles E. Cotting, Eugene N. Foss, Richard Olney, and Percy Parker, shall hold office until the third annual meeting of the shareholders; except that said Trustees, as well as any Trustees

EXHIBITS.

hereafter elected, shall in all cases hold office until their successors have been elected and accepted this trust.

The shareholders shall, at each annual meeting, or adjournment thereof, elect five Trustees to serve for the term of three years next ensuing. In case of death, resignation, or inability to act of any of said Trustees, the remaining Trustees shall accept any resignation and fill any vacancy for the unexpired term. As soon as any Trustees elected by the shareholders or by the remaining Trustees to fill a vacancy have accepted this trust, the trust estate shall rest in the new Trustees or Trustee, together with the continuing Trustees, without any further act or conveyance.

THIRD. The Trustees shall hold the legal title to all property at any times belonging to their trust, and shall have and exercise the exclusive management and control of the same; they shall assume all contracts for and obligations and liabilities in connection with or growing out of the purchase of the stock or securities assigned to them by the Subscribers and mentioned in the annexed schedule, and to the extent and value of such stock and securities, but not personally, shall agree to hold the Subscribers and any person associated or acting with them harmless and indemnified from and against any loss, cost, expense, or liability upon, by reason of, or in connection with, any such contract, obligation or liability; they may adopt and use a common seal; they shall have power to vote in person or by proxy upon all shares of stock at any time belonging to the trust, and to collect, receive, and receipt for the dividends thereon, and may contract with each or any of the controlled companies in respect of any matter or matters relating to the operation of the road or the conduct of the business of any such company or companies, to collect, sue for, receive and receipt for all sums of money at any time coming due to said trust; to employ counsel to begin, prosecute, defend and settle suits at law, in equity or otherwise, and to compromise or refer to arbitration any claims in favor of or against the trust; they may also, with the consent of not less than ten of their number

HOLDING TRUST.

given at a meeting called for that purpose, but not otherwise, exchange, upon such terms as may be agreed upon, the stock or securities held by them in any corporation for the stock or securities of any other corporation, taking over the property of such corporation by consolidation or otherwise; and with such consent but not otherwise, may loan money to any corporation of which they may own a majority of the capital stock, and may subscribe for or acquire additional stock or the securities or obligations of such corporations; and with such consent, but not otherwise, may subscribe for, purchase, and acquire shares in the capital stock of any corporation (1) owning or operating railways or railroads, or engaged in the business of transporting merchandise, mails or express matter, or (2) engaged in whole or in part in supplying light, heat, power or other public service, or (3) manufacturing, selling or repairing machines, equipments, supplies or other articles used by corporations of either or both the classes above named, or (4) engaged in the business of insuring corporations of any or all of the foregoing classes against loss by fire or casualty, or (5) engaged in the business of advertising in the cars or upon the premises of railways, or railroad companies; and with such consent, but not otherwise, may borrow money for any of the purposes aforesaid. With the consent of the holders of at least two-thirds of each class of shares outstanding, at a meeting called for that purpose, but not otherwise except as herein otherwise provided, the Trustees may sell, mortgage, pledge, encumber, or dispose of any shares or stock securities or other property from time to time held by them upon such terms and for such purposes as the shareholders at such meeting may approve.

So far as strangers to this trust are concerned, a resolution of the Trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of the Trustees, and no purchaser from the Trustees shall be bound to see the application of the purchase money or other consideration paid or delivered by or for said purchaser to or for said Trustees.

EXHIBITS.

FOURTH. Stated meetings of the Trustees shall be held at least once a month, and other meetings shall be held from time to time upon the call of the President or any three of the Trustees. A majority of the Board constitutes a quorum, and the concurrence of all the Trustees shall not be necessary to the validity of any action done by them, but the wish of a majority of the Trustees present and voting at any meeting shall be conclusive except as hereinbefore specifically provided. The Trustees may make, adopt, amend, or repeal such by-laws, rules, and regulations, not inconsistent with the terms of this instrument, as they may be deemed necessary or desirable for the conduct of their business and for the government of themselves and their agents, servants, and representatives.

FIFTH. The Trustees shall annually elect from among their number a President and Vice-President of the Board, and shall also annually elect a Treasurer and Secretary, and they shall have authority to appoint such other officers, agents, and attorneys as they may from time to time deem necessary or expedient for the conduct of their business. They shall have authority to accept resignations and to fill any vacancy in the office of President, Vice-President, Treasurer, or Secretary, for the unexpired term; and shall likewise have authority to elect temporary officers to serve during the absence or disability of regular officers. The President, Vice-President, Treasurer, and Secretary shall have the authority and shall perform the duties usually incident to those offices in the case of corporations, so far as applicable thereto, and shall have such other authority and perform such other duties as may from time to time be determined by the Trustees. The Trustees shall fix the compensation of any, or all officers and agents whom they may appoint, and are likewise authorized to pay to themselves such compensation for their own services as they may deem reasonable. The Trustees shall also appoint from among their number an Executive Committee of three or five persons, to whom they may delegate such of the powers herein conferred upon the Trustees as they may deem expedient, except so far as those

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matters are concerned in which the concurrent action of at least ten Trustees is required.

The Trustees shall not be liable for errors of judgment either in holding property originally conveyed to them or in acquiring and afterward holding additional property, nor for any loss arising out of any investment, nor for any act or omission to act performed or omitted by them in the execution of this trust in good faith, nor shall they be liable for the acts or omissions of each other or of any officer, agent, or servant appointed by or acting for them, and they shall not be obliged to give any bond to secure the due performance of this trust by them.

SIXTH. Shares hereunder shall be of the par value of one hundred (\$100.00) dollars each, and shall be divided into preferred and common shares. The preferred shares shall entitle the holder to accumulative semi-annual dividends at the rate of 4 per centum per annum, and no more, the same to be paid or set apart before any dividend shall be paid or set apart for the common shares; and in case of liquidation, the proceeds of the liquidation shall be first applied to the payment to the holder of preferred shares, of the sum of one hundred dollars per share and any accrued and unpaid dividends thereon, and the balance remaining thereafter shall be divided among the holders of common shares in proportion to their holdings. As evidence of the ownership of said shares, the Trustees shall cause to be issued to each shareholder a negotiable certificate or certificates, which certificates shall be in form following, to-wit:

(FORM OF CERTIFICATE OF COMMON STOCK.)

MASSACHUSETTS ELECTRIC COMPANIES.

No.

Shares.

Not subject to assessment.

This certifies that

is the holder of _____ common shares in the
MASSACHUSETTS ELECTRIC COMPANIES, which he

EXHIBITS.

holds subject to an Agreement and Declaration of Trust, dated June 29, 1899, and on file with the Old Colony Trust Company, which is hereby referred to and made a part of this certificate.

The shares in said Massachusetts Electric Companies are divided into two classes, known as preferred and common, and the holders of the preferred shares are entitled to receive semi-annual dividends out of the net earnings of the Companies, at the rate of four per centum per annum, and no more, payable semi-annually, on the first days of January and July in each year, which shall be paid or set apart before any dividends shall be paid or set apart on the common shares.

The dividends on the preferred shares are cumulative, and if, in any period of six months, semi-annual dividends at the rate of four per centum per annum are not paid on said preferred shares, the accrued and unpaid dividends are a charge on the net earnings of the Companies, payable subsequently before any dividends are paid upon the common shares.

In the event of liquidation, the proceeds of liquidation will be first applied to the payment to the holders of preferred shares of the sum of one hundred dollars (\$100) per share and any accrued and unpaid dividends thereon; and the balance remaining thereafter will be divided among the holders of common shares in proportion to their holdings.

The holders of preferred and common shares are entitled to equal voting powers.

This certificate will not be valid until countersigned by the Old Colony Trust Company, Transfer Agent, and the American Trust Company, Agent to Register Transfers; and no transfer hereof will be of any effect as regards the Massachusetts Electric Companies until this certificate has been surrendered and the transfer recorded upon their books.

IN WITNESS WHEREOF, the Trustees under said Declaration of Trust, herein designated as the Massachusetts Electric Companies, have caused their common seal to be hereto affixed and this certificate to be executed in their name and behalf, by their Treasurer, thereto duly authorized.

HOLDING TRUST.

MASSACHUSETTS ELECTRIC COMPANIES.

By, Treasurer.

Countersigned:

Old Colony Trust Company, Transfer Agent.

By..... Assistant Secretary.

By..... Transfer Clerk.

Countersigned:

American Trust Company, Agent to Register Transfers.

By..... Assistant Secretary.

(FORM OF TRANSFER.)

For value received, I hereby sell, assign, transfer, and deliver
to of the within-named
shares of the MASSACHUSETTS ELECTRIC COMPANIES,
and I hereby request that said transfer be recorded on the
books of said Companies.

Witness my hand, this day of

, 19 ..

Witness:

(FORM OF CERTIFICATE OF PREFERRED SHARES.)

MASSACHUSETTS ELECTRIC COMPANIES.

No. Shares.

Not subject to assessment.

This certifies that
is the holder of preferred shares

EXHIBITS.

in the MASSACHUSETTS ELECTRIC COMPANIES, which he holds subject to an Agreement and Declaration of Trust, dated June 29, 1899, and on file with the Old Colony Trust Company, which is hereby referred to and made a part of this certificate.

The shares in said Massachusetts Electric Companies are divided into two classes, known as preferred and common, and the holders of the preferred shares are entitled to receive semi-annual dividends out of the net earnings of the Companies, at the rate of four per centum per annum, and no more, payable semi-annually, on the first days of January and July in each year, which shall be paid or set apart before any dividends shall be paid or set apart on the common shares.

The dividends on the preferred shares are cumulative, and if, in any period of six months, semi-annual dividends at the rate of four per centum per annum are not paid on said preferred shares, the accrued and unpaid dividends are a charge on the net earnings of the Companies, payable subsequently before any dividends are paid upon the common shares.

In the event of liquidation, the proceeds of liquidation will be first applied to the payment to the holders of preferred shares of the sum of one hundred dollars (\$100) per share and any accrued and unpaid dividends thereon; and the balance remaining thereafter will be divided among the holders of common shares in proportion to their holdings.

The holders of preferred and common shares are entitled to equal voting powers.

This certificate will not be valid until countersigned by the Old Colony Trust Company, Transfer Agent, and the American Trust Company, Agent to Register Transfers; and no transfer hereof will be of any effect as regards the Massachusetts Electric Companies until this certificate has been surrendered and the transfer recorded upon their books.

IN WITNESS WHEREOF, the Trustees under said Declaration of Trust, herein designated as the Massachusetts Electric Companies, have caused their common seal to be hereto affixed, and this certificate to be executed in their name and behalf, by their Treasurer, thereto duly authorized.

HOLDING TRUST.

MASSACHUSETTS ELECTRIC COMPANIES.

By, Treasurer.

Countersigned:

Old Colony Trust Company, Transfer Agent:

By..... Assistant Secretary.

By..... Transfer Clerk.

Countersigned:

American Trust Company, Agent to Register Transfers.

By..... Assistant Secretary.

(FORM OF TRANSFER.)

For value received, I hereby sell, assign, transfer and deliver
to of the within-named
shares of the MASSACHUSETTS ELECTRIC COMPANIES;
and I hereby request that said transfer be recorded on the books
of the Companies.

Witness my hand, this

day of

19 .

Witness:

SEVENTH. In addition to the shares to be originally issued to the subscribers as hereinbefore provided, the Trustees shall issue and sell, at public or private sale, upon such terms and for such prices as they may deem expedient, such additional preferred or common shares, or both, as may be necessary to provide means to pay for the stock of the New Bedford, Middleborough, and Brockton Street Railway Company, the contract

EXHIBITS.

for the purchase of which is to be assigned to and assumed by the Trustees.

Except as aforesaid, no share shall be issued by the Trustees in excess of the amount to be originally issued to the Subscribers, as hereinbefore stated. But the Trustees may from time to time, for the purpose of acquiring means for the acquisition of additional property or otherwise accomplishing the purpose of this trust, with the consent of at least two-thirds of the preferred stockholders and two-thirds of the common shareholders, present and voting, at any meeting called for that purpose, issue and dispose of additional shares upon such terms and in such manner as the shareholders at such meeting may determine.

In case of the loss or destruction of any certificates of shares issued by the Trustees, the Trustees may, under such condition as they may deem expedient, issue a new certificate or certificates in the place of the one lost or destroyed.

EIGHTH. The Trustees may from time to time declare and pay dividends out of the net earnings from time to time received by them, but the amount of such dividends and the payment of them shall be wholly in the discretion of the Trustees; except that the dividends on the preferred shares shall be payable semi-annually on the first days of June and December in each year, at the rate of 4 per cent per annum, and no more, and shall be cumulative, and said semi-annual dividends shall be paid or set apart before any dividends are paid on the common shares.

NINTH. The fiscal year of the Trustees shall end on the thirteenth day of September in each year. Annual meetings for the election of five Trustees and for the transaction of other business, shall be held in Boston, on the Wednesday following the first Monday of November, in each year, beginning with the year 1900, of which meetings notice shall be given by the Secretary, by mail, to each shareholder, at his registered address, at least ten days before said meeting.

HOLDING TRUST.

Special meetings of the shareholders may be called at any time, upon seven days' notice given as above stated, when ordered by the President or Trustees. At all meetings of the Shareholders, each holder of shares, whether preferred or common, shall be entitled to one vote for each share held by him, and any shareholder may vote by proxy.

No business shall be transacted at any special meeting of the shareholders unless notice of such business has been given in the call for the meeting.

No business except to adjourn shall be transacted at any meeting of the Shareholders unless the holders of a majority of all the shares outstanding are present in person or by proxy.

TENTH. The death of a Shareholder or Trustee during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representative of the deceased shareholder to an accounting, or to take any action in the courts, or elsewhere, against the Trustees; but the executors, administrators, or assigns of any deceased shareholder shall succeed to the rights of said decedent under this trust, upon surrender of the certificate for the shares owned by him.

The ownership of shares hereunder shall not entitle the shareholders to any title in or to the trust property whatsoever, or right to call for a partition or division of the same, or for an accounting.¹

ELEVENTH. The Trustees shall have no power to bind the shareholders personally, and the subscribers and their assigns and all persons or corporations extending credit to, contracting with, or having any claim against the Trustees shall look only to the funds and property of the trust for payment under such

¹This author takes the prohibition of "an accounting" to mean an accounting so far as title to trust property or in any proceeding for its partition or division, and that it is not intended to debar a *cestui* from any disclosure properly demanded as this may be required so far as his interest may be concerned. For comparison see form on page 335. See also §§ 21, 135, 141, 142, 168.

EXHIBITS.

contract or claim, or for the payment of any debt, damage, judgment, or decree, or of any money that may otherwise become due or payable to them from the Trustees, so that neither the Trustees nor the shareholders, present or future, shall be personally liable therefor.

In every written order, contract, or obligation which the Trustees shall give or enter into, it shall be the duty of the Trustees to stipulate that neither the Trustees nor the Shareholders shall be held to any personal liability under or by reason of such order, contract, or obligation.

TWELFTH. This trust shall continue for the term of twenty-one years, at which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the holders of preferred and common shares according to the priorities hereinbefore expressed, PROVIDED, HOWEVER, that if prior to the expiration of said period, the holders of at least two-thirds of the shares then outstanding shall, at a meeting called for that purpose, vote to terminate or to continue this trust, then said trust shall either terminate or continue in existence for such further period as may then be determined.¹

For the purpose of winding up their affairs and liquidating the assets of the trust, the then Board of Trustees shall continue in office until such duties have been fully performed.

This agreement and declaration of trust may be amended or altered except as regards the liabilities of the Trustees at any annual or special meeting of the shareholders with the consent of the holders of at least two-thirds of the shares of each class then outstanding; provided notice of the proposed amendment or alteration shall have been given in the call for the meeting; and in case of such alteration or amendment, the same shall be attached to and made a part of this agreement, and a copy thereof shall be filed with the OLD COLONY TRUST COMPANY.

¹As to validity or not of this proviso see §§ 96, 97, 171.

HOLDING TRUST.

IN WITNESS WHEREOF, the said Gordon Abbott, Charles Francis Adams, 2d, S. Reed Anthony, John N. Beckley, Amos F. Breed, Everett W. Burdett, Charles E. Cotting, Eugene N. Foss, Walter Hunnewell, Stillman F. Kelley, E. Rollins Morse, Richard Olney, Percy Parker, S. Endicott Peabody, and Philip L. Saltonstall, Trustees, hereinbefore mentioned, have hereunto set their hands and seals, in token of their acceptance of the trust hereinbefore mentioned, for themselves and their successors, and the said E. Rollins Morse, Henry Russell Shaw, Robert W. Emmons, 2d, and George W. Parker, as co-partners under the firm name of E. Rollins Morse and Brothers, and William A. Tucker, S. Reed Anthony, Philip L. Saltonstall, and Nathan Anthony, as co-partners under the firm name of Tucker, Anthony and Company, Subscribers, have hereunto set their hands and seals, in token of their assent to and approval of said terms of trust, for themselves and their assigns, the day and year first above written.

(Signed)

E. Rollins Morse, Henry Russell Shaw, Robert W. Emmons, 2d, George W. Parker,	}	CO-PARTNERS UNDER THE FIRM NAME OF E. ROLLINS MORSE & BROTHERS.
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William A. Tucker, S. Reed Anthony, Philip L. Saltonstall, Nathan Anthony,	}	CO-PARTNERS UNDER THE FIRM NAME OF TUCKER, AN- THONY & COMPANY.
---	---	---

Gordon Abbott,
Charles F. Adams, 2d,
S. Reed Anthony,
John N. Beckley,
Amos F. Breed,
Everett W. Burdett,
Charles E. Cotting,
Eugene N. Foss,

Walter Hunnewell,
Stillman F. Kelley,
E. Rollins Morse,
Richard Olney,
Percy Parker,
S. E. Peabody,
Philip L. Saltonstall.

EXHIBITS.

Agreement and

Declaration of Trust of the

MASSACHUSETTS ELECTRIC COMPANIES.

For three years:

Richard Olney,	Eugene N. Foss,
Charles E. Cotting,	Percy Parker,
Charles Francis Adams, 2d.	

For two years:

Gordon Abbott,	John N. Beckley,
Amos F. Breed,	Stillman F. Kelley,
Walter N. Hunnewell.	

For one year:

S. Endicott Peabody,	Everett W. Burdett,
S. Reed Anthony,	Philip L. Saltonstall,
E. Rollins Morse.	

OFFICERS.

President—Amos F. Breed.
Vice-President—Charles E. Cotting.
Secretary—Everett W. Burdett.
Treasurer—Joseph H. Goodspeed.
General Manager—P. F. Sullivan.

Executive Committee:

Gordon Abbott, Chairman,	
Charles F. Adams, 2d,	Percy Parker,
Eugene N. Foss,	Philip L. Saltonstall.

FORM OF DECLARATION OF TRUST ESTABLISHING A MANUFACTURING COMPANY.

Agreement and

Declaration of Trust of the

MASSACHUSETTS GAS COMPANIES.

THIS AGREEMENT, made this twenty-fifth day of September, A. D. nineteen hundred and two, by and between Charles Francis Adams, 2d, Walter Cabot Baylies, Samuel Carr, Robert Clarence Pruyn, Joseph Ballister Russell, Frederic Elmer Snow, Charles Augustus Stone, Albert Strauss, Christopher Minot Weld, and Robert Winsor, together with their successors (herein designated as the "Trustees"), and Francis H. Peabody, Frank G. Webster, Frank E. Peabody, and Robert Winsor, co-partners, carrying on business in the city of Boston under the name of Kidder, Peabody & Company, and James Seligman, Isaac N. Seligman, Henry Seligman, Jefferson Seligman, Emil Carlebach, Albert Strauss, and Frederick Strauss, co-partners, carrying on business in the city of New York under the name of J. & W. Seligman & Company, together with their assigns (herein designated as the "Subscribers"), witnesseth:

WHEREAS it is proposed that the Trustees shall acquire from the subscribers, upon such terms and conditions as may be agreed upon, certain property and cash, and shall employ and manage the same and all other property which they may hereafter acquire as such Trustees, in the manner hereinafter stated; and it is likewise proposed that the beneficial interest in the property, from time to time held by the Trustees, and in the business conducted by them, shall be divided into shares to be evidenced by certificates therefor, as hereinafter provided:

NOW, THEREFOR, the Trustees hereby declare that they will hold said property and cash so to be acquired by them as

EXHIBITS.

well as all other property which they may acquire as such Trustees, together with the proceeds thereof, in trust, to manage and dispose of the same for the benefit of the holders, from time to time, of the certificates of shares issued and to be issued hereunder, according to the priorities expressed in said certificates, and in the manner and subject to the stipulations herein contained, to-wit:

FIRST. The Trustees, in their collective capacity, shall be designated, so far as practicable, as the "Massachusetts Gas Companies" and under that name shall, so far as practicable, conduct all business and execute all instruments in writing, in the performance of their trust.

SECOND. The Trustees shall be ten in number; and, of the Trustees herein mentioned by name, Charles Francis Adams, 2d, Walter Cabot Baylies, Samuel Carr, Robert Clarence Pruyn and Joseph Ballister Russell shall hold office until the first annual meeting of the shareholders, and Frederic Elmer Snow, Charles Augustus Stone, Albert Strauss, Christopher Minot Weld and Robert Winsor shall hold office until the second annual meeting of the shareholders, except that said Trustees, as well as any Trustees hereafter elected, shall in all cases hold office until their successors have been elected, and accepted this trust.

The shareholders shall, at each annual meeting, or adjournment thereof, elect five Trustees to serve for the term of two years next ensuing. In case of the death, resignation, or inability to act of any of said Trustees, the remaining Trustees shall fill any vacancies for the unexpired term. As soon as any Trustees elected by the shareholders or by the remaining Trustees to fill a vacancy have accepted this trust, the trust estate shall vest in the new Trustees or Trustee, together with the continuing Trustees, without any further act or conveyance.

Upon the election of any Trustee either by the remaining Trustees to fill a vacancy, or by the shareholders, he shall forthwith execute a written acceptance of this trust, which, together

MANUFACTURING TRUST.

with a certificate of the Secretary of the election of such trustee shall be forthwith filed with the Trust Company at that time having the custody of the duplicate original of this instrument.

THIRD. The Trustees are authorized to engage—

(a) In the business of manufacturing, buying, selling and dealing in coal, oil, coke, gas and all products thereof;

(b) In the business of manufacturing and supplying gas or electricity or any other agent for light, heat, power, or other purposes;

(c) In the business of acquiring, owning, managing, exchanging, selling, and dealing in the stocks, shares and securities of corporations, trusts or associations engaged, in whole or in part, in any business above mentioned, or in owning or operating railways or railroads or transporting passengers, merchandise, mails or express matter, or in manufacturing, selling or repairing machines, equipments, supplies, or other articles used by corporations, trusts or associations of any of the classes above mentioned, and or in the business of acquiring, owning, managing, exchanging, selling, or dealing in the stocks, shares or securities of any corporation, trust or association which owns, or whose stock or securities are based upon or secured by the stocks or securities of any corporation, trust or association of the character above mentioned;

(d) In any business similar in character to that above mentioned which the trustees may deem expedient, and to acquire, hold, and dispose of the stocks, shares or securities of corporations, trusts or associations doing business of a character similar to any business above described.

The Trustees shall hold the legal title to all property at any time belonging to this trust, and, subject only to the specific limitations herein contained, they shall have the absolute control, management, and disposition thereof, and shall likewise have the absolute control of the conduct of all business of the

EXHIBITS.

trust; and the following enumeration of specific duties and powers shall not be construed in any way as a limitation upon the general powers intended to be conferred upon them.

The Trustees shall have authority to adopt and use a common seal; to make all such contracts as they may deem expedient in the conduct of the business of the trust; from time to time to release, sell, exchange, or otherwise dispose of, at public or private sale, any or all of the trust property, whether real or personal, for such prices either in cash or the stocks, shares, or securities of other corporations, trusts or associations and upon such terms as to credit or otherwise as they may deem expedient; to guarantee or assume the obligations of other corporations, trusts or associations and to enter into such agreements by way of indemnity or otherwise as they may deem expedient in connection with the acquisition of property from the subscribers as hereinbefore provided or otherwise; to confer, by way of substitution, such power and authority on the President, Treasurer, Secretary, and Executive Committee, and other officers and agents appointed by them, as they may deem expedient; to borrow money for the purposes of the trust and give the obligations to the Trustees therefor; to loan any money from time to time in the hands of the Trustees, with or without security, on such terms as they may deem expedient; to subscribe for, acquire, own, sell, or otherwise dispose of such real or personal property, including the stocks, shares, and securities of any other corporations, trusts or associations, as they may deem expedient in connection with the purposes of the trust; to vote in person or by proxy on all shares of stock at any time held by them, and to collect and receive the income, interest, and profits of any such stock or securities; to collect, sue for, receive, and receipt for all sums of money at any time becoming due to said trust; to employ counsel and to begin, prosecute, defend, and settle suits at law, in equity or otherwise, and to compromise or refer to arbitration any claims in favor of or against the trust; and in general to do all such matters and things as in their judgment will promote or advance the business which they are authorized to carry on, although such matters and things may

MANUFACTURING TRUST.

be neither specifically authorized nor incidental to any matters or things specifically authorized. In addition to the powers herein granted the Trustees shall have all powers with reference to the conduct of the business and management of the property of the trust which are possessed by directors of a manufacturing corporation under the laws of the Commonwealth of Massachusetts.

So far as strangers to the trust are concerned, a resolution of the Trustees authorizing a particular act to be done shall be conclusive evidence in favor of strangers that such act is within the power of the Trustees; and no purchaser from the Trustees shall be bound to see to the application of the purchase money or other consideration paid or delivered by or for said purchaser to or for the Trustees.

FOURTH. Stated meetings of the Trustees shall be held at least once a month, and other meetings shall be held from time to time upon the call of the President or any three of the Trustees. A majority of the Trustees shall constitute a quorum; and the concurrence of all the Trustees shall not be necessary to the validity of any action taken by them, but the decision expressed by vote of a majority of the Trustees present and voting at any meeting shall be conclusive.

The Trustees may make, adopt, amend, or repeal such by-laws, rules, and regulations not inconsistent with the terms of this instrument as they may deem necessary or desirable for the conduct of their business and for the government of themselves, their agents, servants and representatives.

FIFTH. The Trustees shall annually elect from among their number a President, and shall also elect from among their number or otherwise, a Treasurer, a Secretary, and, in their discretion, one or more Vice-Presidents, and one or more Assistant Treasurers or Secretaries, and they shall have authority to appoint such other officers, agents, and attorneys as they may deem necessary or expedient in the conduct of their business. They shall also have authority to accept resignations and to fill

EXHIBITS.

any vacancies in the offices appointed by them, for the unexpired term, and shall likewise have authority to elect temporary officers to serve during the absence or disability of regular officers. They may also by a majority vote of all the Trustees, remove any officer or agent elected or appointed by them.

The President, Treasurer, and Secretary shall have the authority and perform the duties usually incident to those offices in the case of corporations, so far as applicable thereto, and shall have such other authority and perform such other duties as may from time to time be determined by the Trustees. The Trustees shall fix the compensation, if any, of all officers and agents whom they may elect or appoint, and may also pay to themselves such compensation for their own services as they may deem reasonable.

The Trustees may also appoint from among their number an Executive Committee of three or five persons, to whom they may delegate such of the powers herein conferred upon the Trustees as they may deem expedient.

The Trustees shall cause to be kept by the Secretary elected by them a record of all meetings of the shareholders, Trustees and Executive Committee, which record shall be of the same character and effect as that kept in the case of corporations, and so far as strangers to the trust are concerned, shall be conclusive against the Trustees of the facts and doings therein stated.

The Trustees shall not be liable for any error of judgment, or for any loss arising out of any act or omission in the execution of this trust, so long as they act in good faith, nor shall they be personally liable for the acts or omissions of each other, or for the acts or omissions of any officer, agent, or servant elected or appointed by or acting for them; and they shall not be obliged to give any bond to secure the due performance of this trust by them.

MANUFACTURING TRUST.

Any Trustee may acquire, own, and dispose of shares in this trust to the same extent as if he were not a Trustee.

SIXTH. The beneficial interest in this trust shall, in the first instance, be divided into three hundred thousand (300,000) shares of the par value of one hundred (100) dollars each, of which one hundred and fifty thousand (150,000) shares shall be preferred and one hundred and fifty thousand (150,000) common.

The preferred shares shall entitle the holder to receive out of the net profits of the trust, a semi-annual, preferential, cumulative dividend at the rate of four per centum per annum, and no more, commencing to accrue on the first day of December, 1902, payable on the first days of June and December in each year, and to be paid or provided for before any dividend shall be set apart or paid on the common shares, provided that after the payment or setting aside of a semi-annual dividend on the preferred shares at the rate of four per centum per annum, all previously accrued dividends thereon having been paid or set aside, the Trustees may forthwith, without waiting for the expiration of the year, pay or set aside a semi-annual dividend on the common shares; and, in case of liquidation, the proceeds of liquidation shall be first applied to the payment to the holders of preferred shares of the sum of one hundred dollars per share and accrued and unpaid dividends thereon, and the balance remaining thereafter shall be divided among the holders of common shares in proportion to their holdings.

As evidence of the ownership of said shares the Trustees shall cause to be issued to each shareholder a negotiable certificate, or certificates, to be signed by such transfer agent or transfer agents and registrar or registrars as the Trustees may determine, and by the President or any Vice-President, and

EXHIBITS.

attested by any Secretary or Assistant Secretary, which certificates shall be in the form following, to-wit:

MASSACHUSETTS GAS COMPANIES.

No. Preferred Shares.

Not subject to assessment.

This certifies that

is the holder of Preferred Shares in the Massachusetts Gas Companies, which he holds subject to an Agreement and Declaration of Trust dated September 25th, 1902, a duplicate original of which is on file with the Trust Company, and which is hereby referred to and made a part of this certificate.

The shares in the Massachusetts Gas Companies are of the par value of one hundred dollars each, and are divided into preferred and common shares.

It is mutually agreed between the holder hereof and the Massachusetts Gas Companies and its shareholders as follows: that the preferred shares are entitled out of the net profits of the Companies to a semi-annual, preferential, cumulative dividend at the rate of four per centum per annum, and no more, commencing to accrue on the 1st day of December, 1902, payable on the first days of June and December in each year, and to be paid or provided for before any dividend shall be set apart or paid on the common shares, provided that after the payment or setting aside of a semi-annual dividend on the preferred shares at the rate of four per centum per annum, all previously accrued dividends thereon having been paid or set aside, the Massachusetts Gas Companies may forthwith, without waiting for the expiration of the year, pay or set aside a semi-annual dividend on the common shares; that in the event of liquidation the proceeds of liquidation shall be first applied to the payment, to holders of the preferred shares, of the sum of one hundred dollars per share and accrued and unpaid dividends thereon, and the balance remaining thereafter shall be divided among

CERTIFICATES OF SHARES.

the holders of common shares in proportion to their holdings; that the holders of preferred and common shares shall have equal voting powers, and that the preferred and common shares may be increased or reduced as provided in the Agreement and Declaration of Trust herein referred to.

This certificate must be signed by the Transfer Agent and Registrar of the shares of the Massachusetts Gas Companies, who sign solely to indicate that the shares represented by this and all other outstanding certificates bearing their signatures do not exceed the issue of shares fixed by the votes of the Massachusetts Gas Companies.

No transfer hereof will be of any effect as regards the Massachusetts Gas Companies until this certificate has been surrendered and the transfer recorded upon their books.

IN WITNESS WHEREOF, the Trustees under said Declaration of Trust herein designated as the Massachusetts Gas Companies, have caused their common seal to be hereto affixed and this certificate to be executed in their name and behalf, by

their President, and attested by their Secretary, this

day of 19 .

MASSACHUSETTS GAS COMPANIES.

By....., President.

Attest:

By....., Secretary.

By....., Transfer Agent.

By....., Registrar.

By.....

EXHIBITS.

NOTICE.—The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever.

For value received
hereby sell, assign, and transfer unto
preferred shares of the Massachusetts Gas
Companies, represented by the within certificate, and do
hereby irrevocably constitute and appoint
attorney, to transfer the said shares on
the books of the within-named Companies, with full
power of substitution in the premises.

Witness hand this day of

In presence of

MASSACHUSETTS GAS COMPANIES.

No. Common Shares.

Not subject to assessment.

This certifies that

is the holder of Common Shares in
the Massachusetts Gas Companies, which he holds subject to
an Agreement and Declaration of Trust dated September 25th,
1902, a duplicate original of which is on file with the Old Colony
Trust Company, and which is hereby referred to and made a
part of this certificate.

The shares in the Massachusetts Gas Companies are of the
par value of one hundred dollars each, and are divided into
preferred and common shares.

It is mutually agreed between the holder hereof and the Mass-
achusetts Gas Companies and its shareholders as follows; that
the preferred shares are entitled out of the net profits of the
Companies to a semi-annual, preferential, cumulative dividend
at the rate of four per centum per annum, and no more, com-
mencing to accrue on the 1st day of December, 1902, payable
on the first days of June and December in each year, and to be
paid or provided for before any dividend shall be set apart or
paid on the common shares, provided that after the payment or
setting aside of a semi-annual dividend on the preferred shares

CERTIFICATES OF SHARES.

at the rate of four per centum per annum, all previously accrued dividends thereon having been paid or set aside, the Massachusetts Gas Companies may forthwith, without waiting for the expiration of the year, pay or set aside a semi-annual dividend on the common shares; that in the event of liquidation the proceeds of liquidation shall be first applied to the payment, to holders of the preferred shares, of the sum of one hundred dollars per share and accrued and unpaid dividends thereon, and the balance remaining thereafter shall be divided among the holders of common shares in proportion to their holdings; that the holders of preferred and common shares shall have equal voting powers; and that the preferred and common shares may be increased or reduced as provided in the agreement and Declaration of Trust herein referred to.

This certificate must be signed by the Transfer Agent and Registrar of the shares of the Massachusetts Gas Companies, who sign solely to indicate that the shares represented by this and all other outstanding certificates bearing their signatures do not exceed the issue of shares fixed by the votes of the Massachusetts Gas Companies.

No transfer hereof will be of any effect as regards the Massachusetts Gas Companies until this certificate has been surrendered and the transfer recorded upon their books.

IN WITNESS WHEREOF, the Trustees under said Declaration of Trust, herein designated as the Massachusetts Gas Companies, have caused their common seal to be hereto affixed and this certificate to be executed in their name and behalf by their President, and attested by their Secretary, this

day of _____, 19 ____.

MASSACHUSETTS GAS COMPANIES.

By....., President.

Attest:

By....., Secretary.

EXHIBITS.

By....., Transfer Agent.

By....., Registrar.

By.....

NOTICE.—The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever.

For value received
hereby sell, assign, and transfer unto
common shares of the Massachusetts Gas
Companies represented by the within certificate, and do
hereby irrevocably constitute and appoint
attorney, to transfer the said shares on
the books of the within-named Companies, with full
power of substitution in the premises.

Witness hand this day of

In presence of

SEVENTH. The shares hereunder shall be transferable by an appropriate instrument in writing and upon the surrender of the certificate therefor, but no such transfer shall be of any effect as regards the Trustees until it has been recorded upon the books of the Trustees kept for that purpose.

EIGHTH. The Trustees shall issue to the Subscribers, or their assigns, certificates for said original three hundred thousand shares, in payment for and as evidence of their ownership of the beneficial interest in the property and cash proposed to be transferred to the Trustees by the Subscribers, as hereinbefore stated.

NINTH. For any of the purposes of the Trust the number of shares may from time to time, with the consent of the holders of not less than two-thirds of such of the shares as are represented and voted upon at any meeting called for that purpose, but not otherwise, be increased or reduced. In case the number of shares is increased, the additional shares shall be issued and disposed of upon such terms and in such manner as the shareholders at such meeting may determine, and in case of

MANUFACTURING TRUST.

such increase such proportion of the new shares may be made preferred as the shareholders in authorizing such increase may determine.

TENTH. In case of the loss or destruction of any certificate for shares the Trustees may, under such conditions as they may deem expedient, issue a new certificate or certificates in place of the one lost or destroyed.

ELEVENTH. The Trustees may, with the consent of the holders of at least two-thirds of each class of shares outstanding, given at a meeting called for that purpose, but not otherwise, mortgage or pledge any property in their hands, upon such terms and for such purposes as the shareholders at such meeting may approve.

TWELFTH. The Trustees may from time to time declare and pay dividends out of the net earnings from time to time received by them but the amount of such dividends and the payment of them shall be wholly in the discretion of the Trustees, except that the dividends on the preferred shares shall be payable semi-annually on the first day of June and December in each year, at the rate of four per centum per annum and no more, and shall be cumulative, and said semi-annual dividends shall be paid or set apart before any dividends are paid on the common shares.

THIRTEENTH. The fiscal year of the Trustees shall end on the first day of July in each year.

Annual meetings for the election of Trustees and for the transaction of other business shall be held in Boston, on the second Tuesday of October in each year, beginning with the year 1903, of which meetings notice shall be given by the Secretary by mailing such notice to each shareholder at his registered address at least ten days before said meeting.

Special meetings of the shareholders may be called at any time upon seven days' notice, given as above stated, when ordered by the President or Trustees.

EXHIBITS.

At all meetings of the shareholders, each holder of shares, whether preferred or common, shall be entitled to one vote for each share held by him; and any shareholder may vote by proxy.

No business shall be transacted at any special meeting of the shareholders unless notice of such business has been given in the call for the meeting. No business, except to adjourn, shall be transacted at any meeting of the shareholders unless the holders of a majority of all the shares outstanding are present in person or by proxy.

FOURTEENTH. Shares hereunder shall be personal property, giving only the rights in this instrument, and in the certificates thereof, specifically set forth. The death of a shareholder during the continuance of this trust shall not operate to determine this trust, nor shall it entitle the representatives of the deceased shareholder to an accounting or to take any action in the courts or elsewhere against the Trustees; but the executors, administrators, or assigns of any deceased shareholder shall succeed to the rights of said decedent under this trust, upon the surrender of the certificate of shares owned by them.

The ownership of shares hereunder shall not entitle the shareholders to any title in or to the trust property whatsoever, or right to call for a partition or division of the same, or for an accounting;¹ and no shareholder shall have any other or further rights than the rights of a stockholder in a corporation, so far as the same may be applicable.²

FIFTEENTH. The Trustees shall have no power to bind the shareholders personally, or to call upon them for the payment of any sum of money or any assessment whatever other than such sums as they may at any time personally agree to pay by way of subscription to new shares or otherwise. All persons or corporations extending credit to, contracting with, or having any claim against the Trustees shall look only to the funds and

¹See note on page 297.

²It is not considered that this clause would change or was intended to change the trustee's responsibility, as see § 135, where the duties and responsibilities of trustees and directors are distinguished.

MANUFACTURING TRUST.

property of the trust for the payment of any such contract or claim, or for the payment of any debt, damage, judgment, or decree, or of any money that may otherwise become due or payable to them from the Trustees, so that neither the Trustees, shareholders, nor officers, present or future, shall be personally liable therefor.

In every written order, contract, or obligation which the Trustees or officers shall give, authorize, or enter into, it shall be the duty of the Trustees and officers to stipulate, or cause to be stipulated, that neither the Trustees, officers, nor shareholders shall be held to any personal liability under or by reason of such order, contract or obligation.

It is further expressly agreed that in case any Trustee, officer, or shareholder shall at any time for any reason be held to or be under any personal liability as such Trustee, officer, or shareholder, not due to his acts in bad faith, then such Trustee, officer, or shareholder, shall be held harmless and indemnified out of the trust estate from and of all loss, cost, damage, or expense by reason of such liability: and, if at any time the trust estate shall be insufficient to provide for such indemnity and to satisfy all liabilities of and claims upon it, then the trust estate shall, in preference and priority over any and all other claims or liens whatsoever, except mortgages, and except as otherwise expressly provided by law, be applied first to the indemnification of the Trustees from any loss, cost, damage or expense in connection with any personal liability which they may be under or have incurred except as aforesaid: next, to the indemnification in the same manner of the officers, and thereafter to the indemnification in like manner of the shareholders.

SIXTEENTH. This trust shall continue for the term of twenty-one years after the death of the last survivor of the persons whose names are signed hereto, at which time the then Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the holders of preferred and common shares: provided, however, that, if prior to the expiration of said period the holders of at least two-thirds of the

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shares then outstanding shall, at a meeting called for that purpose, vote to terminate or continue this trust, then said trust shall either forthwith terminate or continue in existence for such further period as may then be determined.³ For the purpose of winding up their affairs and liquidating this trust the then Trustees shall continue in office until such duties have been fully performed.

SEVENTEENTH. This Agreement and Declaration of Trust may be amended or altered in any particular whatsoever, except as regards the exemption from personal liability of the Trustees, officers, and shareholders, and except as regards the priorities of the preferred shares, at any annual or special meeting of the shareholders, with the consent of the holders of at least two-thirds of the shares of each class then outstanding, provided notice of the proposed amendment or alteration shall have been given in the call for the meeting: and in case of such alteration or amendment the same shall be attached to and made a part of this agreement, and a copy thereof, with a certificate of the Secretary as to its adoption, shall be filed with the Trust Company at that time having the custody of the duplicate original of this instrument.

Nothing in this article contained shall in any way be construed to limit the power to increase or reduce the number of shares as provided in the ninth article hereof.

EIGHTEENTH. A duplicate original of this Agreement and Declaration of Trust shall be deposited with such Trust Company in the City of Boston as the Trustees may from time to time designate, and the Trustees shall have power at any time to change the company with which such duplicate original is deposited.

NINETEENTH. The Trustees from time to time shall determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the Trustees or any of them shall be open to the

³As to validity or not of this proviso see §§ 96, 97, 171.

MANUFACTURING TRUST.

inspection of the shareholders, and no shareholder shall have any right to inspect any account or book or document of the Trustees except as authorized by the Trustees or by resolution of the shareholders.

IN WITNESS WHEREOF, the said Charles Francis Adams, 2d, Walter Cabot Baylies, Samuel Carr, Robert Clarence Pruyn, Joseph Ballister Russell, Frederic Elmer Snow, Charles Augustus Stone, Albert Strauss, Christopher Minot Weld, and Robert Winsor, Trustees hereinbefore mentioned, have hereunto set their hands and seals in token of their acceptance of the trust hereinbefore mentioned, for themselves and their successors, and the said Francis H. Peabody, Frank G. Webster, Frank E. Peabody, and Robert Winsor, co-partners, carrying on business in the City of Boston under the name of Kidder, Peabody & Company, and James Seligman, Isaac N. Seligman, Henry Seligman, Jefferson Seligman, Emil Carlebach, Albert Strauss and Frederick Strauss, co-partners, carrying on business in the City of New York, under the name of J. & W. Seligman & Company, have hereunto set their hand and seals in token of their assent to and approval of said terms of trust, for themselves and their assigns, the day and year first above written.

Charles Francis Adams 2nd (seal)	p.p.a.	Francis H. Peabody (seal)
		Frank E. Peabody "
Walter Cabot Baylies	"	Frank G. Webster "
Samuel Carr	"	Frank E. Peabody "
Robert Clarence Pruyn	"	Robert Winsor "
Joseph Ballister Russell	"	James Seligman "
	Trustees	Isaac N. Seligman "
Frederic Elmer Snow (seal)		by Henry Seligman, Atty.
Charles Augustus Stone	"	Henry Seligman "
Albert Strauss	"	Jefferson Seligman "
Christopher Minot Weld	"	Emil Carlebach "
Robert Winsor	"	Albert Strauss "
		Frederick Strauss "

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Commonwealth of Massachusetts, }
Suffolk, } ss.

Boston, Sept. 25, 1902.

Then personally appeared the above named Charles Francis Adams 2nd, Walter Cabot Baylies, Robert Clarence Pruyn, Joseph Ballister Russell, Frederic Elmer Snow, Charles Augustus Stone, Albert Strauss, Christopher Minot Weld, Robert Winsor and Frank E. Peabody and acknowledged the foregoing instrument to be their free act and deed.

Before me,

VINCENT FARNSWORTH,

(Notarial Seal)

Notary Public.

Commonwealth of Massachusetts, }
Suffolk, } ss.

Boston, Sept. 26, 1902.

Then personally appeared the above-named Samuel Carr, and acknowledged the foregoing instrument to be his free act and deed.

Before me,

VINCENT FARNSWORTH,

(Notarial Seal)

Notary Public.

September 25th, 1902.

We, the undersigned, Trustees under an Agreement and Declaration of Trust of the Massachusetts Gas Companies dated the 25th day of September, 1902, hereby acknowledge that we have received due notice of the meeting of said Trustees to be held at 115 Devonshire St., Boston, Mass., on the 25th day of September, 1902, at 10 o'clock A. M., for the purposes of organization, including the election of officers, adoption of by-laws and transaction of business incidental thereto, for the purpose

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of considering and acting upon a proposition from Kidder, Peabody & Company and J. & W. Seligman & Company relative to the transfer to the Massachusetts Gas Companies of certain properties and cash as mentioned in the Declaration of Trust of said Massachusetts Gas Companies, and taking such action as may be necessary to carry the same into effect if the offer contained in said proposition is accepted; and we hereby consent and agree that said meeting shall be held at the time and place above mentioned for the purpose above stated.

(Signed)

CHARLES FRANCIS ADAMS, 2ND
WALTER CABOT BAYLIES
ROBERT CLARENCE PRUYN
JOSEPH BALLISTER RUSSELL
FREDERIC ELMER SNOW
CHARLES AUGUSTUS STONE
ALBERT STRAUSS
CHRISTOPHER MINOT WELD
ROBERT WINSOR.

September 25, 1902.

We, the undersigned, Trustees under an Agreement and Declaration of Trust of the Massachusetts Gas Companies dated the 25th day of September, 1902, hereby acknowledge that we have received due notice of the meeting of said trustees to be held at 115 Devonshire St., Boston, Mass., on the 25th day of September, 1902, at 10 o'clock A. M., for the purposes of organization, including the election of officers, adoption of by-laws and transaction of business incidental thereto, for the purpose of considering and acting upon a proposition from Kidder, Peabody & Company and J. & W. Seligman & Company relative to the transfer to the Massachusetts Gas Companies of certain properties and cash as mentioned in the Declaration of Trust of said Massachusetts Gas Companies, and taking such action as may be necessary to carry the same into effect if the offer contained in said proposition is accepted; and we hereby consent and agree that said meeting shall be held at the time and place above mentioned for the purposes above stated.

(Signed) SAMUEL CARR.

STIPULATION ON STATIONERY.

The stationery of the Massachusetts Gas Companies has printed in red ink in the upper right hand corner, the following:

"The name 'Massachusetts Gas Companies' is the designation of the Trustees for the time being under an agreement and declaration of Trust, dated 1902, and all persons dealing with the Massachusetts Gas Companies must look solely to the Trust property for the enforcement of any claim against the Companies, as neither the Trustees, Officers nor Shareholders assume any personal liability for obligations entered into on behalf of the Companies."

AGREEMENT COVERING REORGANIZATION FROM INCORPORATION
TO TRUSTEESHIP.

AGREEMENT made this day of ,
A. D. 191 , between
both of hereinafter called the
Organizers, parties of the first part, the
National Bank, doing business at said
hereinafter called the Depository, party of the second part, and
such holders of stock in the Company,
a corporation organized according to law and having a usual
place of business at
as shall become parties to this agreement, by signing the same or
any copy hereof, hereinafter designated as the Subscribers, parties of the third part.

WHEREAS the Organizers, consider that it will be for the
best interests of the individual stockholders of the said

Company that a Voluntary Association under a
written Declaration of Trust be created, to be known as the
(or by some other name satisfactory to
the Organizers), a copy of which Declaration of Trust, identified by the signatures of the Organizers, is to be filed with the
Depository above-named, and which is hereby referred to as a
part of this agreement as fully as if the same were herein set
forth, for a statement of the purposes, scope, terms and provisions of and pertaining to said Association, it being understood that the persons to act as Trustees under said Declaration are to be hereafter selected by said Organizers, and their names to be by them inserted in said Declaration, and that the number of shares to be originally issued thereunder by the Trustees is to be hereafter determined and inserted therein by the Organizers, subject to this express stipulation, however, that in the entire amount of shares to be originally issued under said

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Declaration, the number of shares of each class in said Association issued to each Subscriber, shall, as to the total number of shares in each like class of the Association to be originally issued, be exactly proportional to the amount which the respective shares of stock standing on the books of the (corporation) in the name of said Subscriber at the date of transfer, bear to the whole amount of outstanding stock of the like class of the said (corporation) and if any such stock is preferred the shares of the Association issued for such shall have the same preference and be issued share for share.

WHEREAS the object of said Association, in addition to the objects set forth in said Declaration of Trust, shall be to acquire and become the owner of at least a majority of the issued capital stock of the said (corporation).

WHEREAS the Subscribers are willing and desirous to sell, transfer and assign their said respective shares in said corporation to the Organizers, for and in consideration and upon the basis of exchange hereinafter specified:

NOW THEREFORE, in consideration of the premises, and in further consideration of the sum of One Dollar, to each of the Subscribers by the Organizers in hand paid, the receipt of which by each of the Subscribers is hereby respectively acknowledged, the Subscribers do hereby severally, but not jointly, agree to and with the Organizers as follows:

1. The Subscribers do hereby severally agree to sell to the Organizers the number of shares of capital stock of the said (corporation) to the amount set opposite their respective names or stated in the certificates of deposit issued to them respectively by the Depository as hereinafter provided, it being understood and agreed that such holders of stock shall in all cases deposit the certificates for their stock, and also such transfers, assignments and powers of attorney as may be required by the Organizers in order to vest in said Organizers, and to enable them to transfer the complete

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and absolute title to said stock, and the Subscribers agree respectively at any time on demand of the Organizers to execute any and all other transfers, assignments and writings required for vesting the complete ownership of the stock hereunder in the Organizers or their nominee, for the purpose of enabling the Organizers to carry out the purposes of this agreement.

2. The Depository shall issue to the Subscribers so depositing their stock, its certificates of deposit therefor, specifying the amount and kind of stock, said certificates to entitle the holders thereof to

(1) a return of their stock in the _____ (corporation) on or before _____, or such later date as may be fixed, as hereinafter provided, in case of the failure of the Organizers to carry out the purpose of this agreement, or

(2) in the event of the plan being by the Organizers or one of them declared in writing to the Depository to be operative and in force, then to the amounts of shares of the Association set forth in the holders' certificates of deposit respectively.

All rights of such Subscribers in respect of such deposits shall be such only as shall be evidenced by their respective certificates of deposit; and therefore the holder of any such certificate or of any certificate issued in lieu thereof, or in exchange therefor, shall be subject to this agreement, and entitled to have, and exercise, the rights of the original Subscribers under the certificate issued to him or her in respect of the securities therein mentioned, and these rights shall pass to any executor or administrator of a Subscriber in the same manner as though such were certificates of stock, without any formal transfer whatever.

By accepting any such certificate, every recipient or holder thereof shall thereby become a party to this agreement, with the same force and effect as though an actual Subscriber hereto. Until a deposit shall have been fully completed hereunder, and

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a certificate therefor actually issued to the depositor, neither the depositor nor any one claiming under him or her shall have any right hereunder, and then only as specified in such certificate.

3. For shares, so deposited hereunder, the amount of the stock of which hereinafter required to make this plan operative, shall have been so deposited as aforesaid the Depository shall, when this agreement shall have become operative, and when and as the new securities shall have been received by the Depository from the Organizers, deliver to the Subscribers, or to such other persons as shall be entitled thereto, the following:—

For every share of common stock of the
(corporation) common shares of the Association to
be originally issued.

4. To make this agreement binding, operative and effective, there must have been deposited hereunder at least
shares of the (corporation).

5. is hereby fixed as the date of the expiration of the time for the deposit of the shares, but such time may be extended not exceeding Thirty days thereafter, by agreement between the Organizers and the Depository, and in case the Organizers shall not notify the Depository that they are ready to complete the purchase of the shares within thirty days after said , the shares deposited hereunder shall be returned by the Depository without charge to the depositors of the same, respectively, or to the holders of said certificates of deposit, upon the surrender to the Depository of said certificates of deposit, duly endorsed.

6. When the Organizers or any of them declare in writing to the Depository the plan herein contemplated to be operative, the said Subscribers, for the consideration aforesaid, do further nominate and appoint their true and lawful attorney irrevocable, to transfer to the order of said Organizers the said respective shares of stock of the and further agree that the delivery to the said Depository by

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said Organizers of the said respective shares in said Association, shall be accepted in full payment for said shares, and constitute an absolute and irrevocable sale of the said stock of the (corporation) and that thereafter all the Subscribers' rights shall be only those secured to him or her as a shareholder in said Association as shall be described in said Declaration of Trust.

7. In the event of the death of any of said Organizers, the survivors or survivor shall succeed to all the rights and powers of the deceased, and may proceed to carry out said agreement.

8. The Depository aforesaid agrees to receive said shares of said (corporation) stock, to hold and deliver under the terms of this agreement.

9. The organizers, in consideration of the premises and promises above set forth, agree to use their best efforts to carry out and complete the organization of said Voluntary Association, and the execution of the plan contemplated in this instrument.

IN WITNESS WHEREOF, the said Organizers have hereto affixed their signatures, and the Depository has caused these presents to be signed in its name and behalf by its , and its corporate seal to be hereto affixed, and the Subscribers either have affixed their signatures hereto or to an instrument of which the within is a copy, and have deposited the respective number of shares of the stock of the (corporation) held by them with the Depository, under the terms of this instrument.

Bank, by

Cashier.

} Organizers.

SUBSCRIBERS.

Signature.

Number of Shares.

Agreement and Declaration of Trust
of the
Company.

WHEREAS, it is the purpose and intention that the business of said Trust shall be to own and acquire at least a majority of the issued and outstanding shares of the capital stock of the Company (corporation) and such of the properties and assets of said corporation as may from time to time be deemed expedient, and to engage in and conduct the business heretofore conducted by said corporation any other business such as by the Trustees may be considered advisable, and tending to enhance the value of the shares of the Trust; to participate in the benefits of the same, as *Cestuis que Trustent*, ratably according to their several holdings of shares and subject to their

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respective rights, including herein not only such property as has been transferred to the Trustees, but all such further and additional property as may be acquired by the Trustees under the authority herein conferred.

NOW THEREFORE, the Trustees declare that they hold the property and assets that have been acquired under the foregoing provisions, together with all such property and assets as may be hereafter acquired, in trust, the same to manage, invest, reinvest and dispose of, as follows, to wit:—

ARTICLE I.

The Trustees herein named, and those that shall from time to time be elected under the provisions of the Articles of Agreement and this Declaration of Trust, in their collective capacity, shall be designated as, and act under the name of

ARTICLE II.

The beneficial interest in this Association and its business and assets is divided into common shares of no nominal or par value, as shown and set forth in the negotiable certificates issued by the Depository. The Trustees may, at any time, under the authority of a vote of a majority of the holders of the common shares, at a meeting duly called and held for the purpose, cause to be issued negotiable certificates or evidences of interest, as *Cestuis que Trustent*, additional shares, describe what class, whether preferred or common, they shall represent, and under what terms and conditions they shall be issued, and at what prices they shall be sold.

The Trustees, for the payment of dividends or for any other purpose, are not required to recognize as a shareholder, any one whose name does not appear as such upon the books of the Association kept for the purpose. In connection with the transfer of shares of this Association, certificates already issued and outstanding, with duly executed authority for the purpose, must be surrendered for cancellation.

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ARTICLE III.

The number of the Trustees of this Association shall be
to hold until the next annual meeting,
until the second annual meeting, until
the third annual meeting.

At each annual meeting, the shareholders shall elect a sufficient number to fill vacancies, whether for the full term of three years, or for one of the shorter terms. Each Trustee shall hold office until his successor is duly elected and qualified. Vacancies in any of the offices of Trustees which may arise between meetings, shall be filled by the remaining or surviving Trustees or Trustee, the new Trustee or Trustees to hold until the next annual meeting.

Any of the Trustees may resign, in which case the legal title to the property and business of the Association shall pass to the succeeding Trustees without any formal transfer.

In the event that all the Trustees of this Association shall have resigned or deceased, leaving no Trustee surviving, the legal title to the property and business thereof, shall be vested in the executors and administrators of the deceased Trustees, pending the election of new Trustees, and when the latter are elected, the property formerly held by the deceased Trustees, shall vest in them. Should the offices of all the Trustees become vacant by death, resignation or otherwise, Shareholders may cause a special meeting of their members to be called and held, to elect new Trustees to fill the vacancies.

ARTICLE IV.

The Trustees shall have and hold the legal title to the property of the Association, and have the exclusive management and control of the same; the Trustees may hold equitable titles should occasion require.

They shall, as Trustees hereunder, but not personally, assume all contracts, obligations, and liabilities in connection with,

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or arising out of, the acquiring of the property hereinbefore referred to as assigned and conveyed to them; and as such Trustees, but not personally, to the extent of the value of the same, agree to hold the Depository harmless and indemnified from and against any damage, expense, or liability upon, by reason of, or in connection with the same. They may adopt and use a common seal; they shall have power to vote in person or by proxy upon all shares of stock at any time belonging to the Trust; they may collect, receive and receipt for any dividends thereon; they may collect, bring suit, receive and receipt for any sums of money becoming due to said Trust; they may employ counsel; may begin, defend, and settle suits at law or in equity. They may, from time to time, borrow money and issue notes or other obligations, except bonds, to evidence such debts, but, except by vote of the holders of a majority of the common shares of the Trust, issued and outstanding, they shall not borrow money in excess of the sum of dollars. Except for the purpose of qualifying persons to act as Directors or officers of corporations, they shall not mortgage or pledge any property of the Trust or issue bonds of the Trust except upon such terms and for such purposes as may be approved by the holders of at least two thirds of the common shares of the Trust then issued and outstanding, given at an annual meeting of the shareholders or at a special meeting called and held for that purpose.

So far as strangers to this Trust are concerned, a resolution of the Trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the power of the Trustees, and no purchaser from the Trustees shall be bound to see to the application of the purchase money or other consideration paid or delivered by or for said purchaser to or for said Trustees. For the purpose of establishing as to strangers to the Trust the succession of the Trustees and the titles of the Trustees from time to time to any property of the Trust, whenever any change shall occur in the personnel of the Trustees an affidavit of the remaining Trustees or any one of them recorded with the County,

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Registry of Deeds, or in the event of the death of all the Trustees an affidavit of an executor of a deceased Trustee shall be sufficient and conclusive evidence as to such strangers, that the change in personnel of the Trustees has taken place, that the Trustee or Trustees as named therein have retired as Trustees and that the new successor Trustee or Trustees have succeeded to all the authority formerly possessed by the retired Trustee or Trustees, all as therein set forth, and that the Trustees then qualified to act are as set forth therein.

ARTICLE V.

Meetings of the Trustees shall be held at the office of the Company in _____ or at such other convenient place as may be agreed upon by them, on the _____ days of _____ in each year and at such other times as the President or at least two of the Trustees may request. Notice of such meeting, regular or special, shall be mailed or delivered to each Trustee at least _____ days before such meeting is to be held.

A majority of the Trustees shall constitute a quorum for the transaction of any business that may lawfully come before any meeting, and the vote of a majority of the Trustees present and acting at any meeting shall be conclusive and binding upon the Trustees and this Association.

A certificate of the Secretary shall be conclusive as to the regularity of any meeting, of those present thereat, and of the result of any action, vote or resolution that may have been taken or adopted at such meeting.

The Trustees may make, adopt, amend or repeal such by-laws, rules and regulations not inconsistent with the terms of this instrument as they may deem necessary or desirable for the conduct of their business and for the government of themselves and their agents, servants or representatives.

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ARTICLE VI.

The Trustees shall elect a President at each annual meeting, from their own number, and also a Treasurer and Secretary, and have full power and authority, to appoint and employ all such other officers, agents, servants and attorneys as they may deem necessary or expedient; to fill vacancies in the elective or appointive offices wherever any vacancies may occur, and make temporary appointments during the absence of any regular appointee.

The President, Treasurer and Secretary shall have such authority and perform such duties, and receive such compensation as may from time to time be determined by the Trustees, the Secretary to keep accurate written records and to be sworn.

The Trustees shall fix the compensation, if any, of all officers and agents whom they may appoint, and are likewise authorized to pay to themselves as trustees such compensation for their own services as they may deem reasonable; but any trustee may be employed by the trustees to perform any special, legal, financial or other service, and may be elected or appointed to any office, and shall in any such case be entitled to receive such additional compensation as the trustees may fix and determine. Any trustee may acquire, hold, own, and dispose of shares in the Trust in his individual name and on his personal account, or jointly with other persons, or as a member of a firm, without being thereby disqualified to act as Trustee; and while so owning and holding any Trust shares on his personal account shall be entitled to all and the same rights and privileges of and as any other shareholder. The Trustees may also appoint from among their number committees to whom they may delegate such of the powers herein conferred upon the Trustees as they may deem expedient.

The Trustees shall not be liable for errors of judgment in acquiring, managing, holding, or transferring any of the property of this Trust, either that originally conveyed to them or that hereafter acquired, nor for any loss arising out of any investment, nor for any act or omission to act, performed or omitted by them in the execution of this Trust in good faith; nor shall they nor

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any or either of them be liable for the acts or omissions of each other or of any officer, agent, or servant appointed by or acting for them, and they shall not be obliged to give any bond to secure the due performance of this Trust by them. Provided, in the management and the conduct of the business of this Trust, it shall be claimed by any party or adjudged by a court of competent jurisdiction that the said Trustees, or any of them, are liable personally for any act or omission to act on their part, or on the part of any officer, agent or servant appointed by or acting for them, in connection with their holding and managing the property of, or carrying on the execution of this Trust in good faith, whether such claim or judgment be in the nature of damage for a tort, or in the nature of a decree of a fine in criminal proceedings, being in either case a claim for a debt, damage, judgment or decree, for which they, or any of them, would otherwise be liable personally, they are hereby expressly authorized to treat such claim, judgment, or decree as though the same were in the nature of a stipulated sum based upon an express contract for which the property in their hands as Trustees would be liable, and to pay the same from the property of the Trust, and they are expressly authorized to enter into contracts of insurance with such party or parties as they may deem expedient for their proper personal protection against such liabilities.

ARTICLE VII.

The original issue of the shares of this Association shall be common, but nothing herein shall prevent the shareholders, by vote of a majority of the shares at a meeting called for the purpose, authorizing the issue of additional shares.

The certificates to be used by the Trustees for the issue of original or subsequent shares shall be substantially as per form annexed to this Declaration of Trust.

ARTICLE VIII.

Whenever it shall have been voted to increase the number of authorized issue of shares beyond the amount of the original issue, the Trustees shall give written notice to each of the share-

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holders, of the proposed issue and each holder of common shares shall be entitled to take at the same valuation that proportion of the new shares to be issued which his holding of common shares issued and outstanding bears to the total number of new common shares to be issued; and be entitled to subscribe in writing within thirty days from the time of the notice at the price fixed by the shareholders for each new common share, to be payable in cash upon the issue of the certificate. If, after thirty days, any of the new shares remain unsubscribed for the Trustees are authorized to sell the same on such terms and conditions as may to them seem advisable.

Unless, and until all of the proposed issue of new shares shall have been subscribed for or sold, the Trustees are under no obligation to issue any of them, and to this end, the Trustees may reserve the right of delivering and demanding payment for the new shares, or of withdrawing the issue from subscription.

A Trustee may, individually or jointly with others, purchase any additional shares of the Trust as issued.

ARTICLE IX.

In the event of the loss or destruction of a certificate, a new one may be issued, on such terms as the Trustees may prescribe.

ARTICLE X.

DIVIDENDS. The Trustees may, from time to time, declare and pay dividends upon the shares of the Trust out of the income from time to time received by them from the management of the Trust. The amount of such dividends upon the Trust shares and the payment of them shall, however, be wholly in the discretion of the Trustees, and subject always to the priorities and preferences of any preferred shares which may be issued over the common shares; and the Trustees shall have full power and authority, except as herein limited, to determine what portions of any receipts or expenditures shall fairly be considered as income, and

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they shall have the authority to reserve, as they may deem fit, such a sum from the gross income actually collected as a reserve or surplus fund, with power to invest the same, or the proceeds thereof, in such form as they may determine, and they may change their determination as to such funds or investments, or any part thereof, from time to time, as to them shall seem prudent and expedient, absolutely at their own discretion.

ARTICLE XI.

The fiscal year of the business of this Association shall begin
and end of each year.

ARTICLE XII.

The annual meeting of the shareholders shall be held at the
office of the Company at on the
day of in each year, the first meeting to be
held in of 19 . . .

Notice in writing of the annual meeting shall be mailed, postage prepaid, by the Secretary to, or be served in person upon, each shareholder of record as shown by the books of the Company, at least seven days before each meeting.

The notice of the annual meeting need contain no statement of the business to be transacted thereat, and all shareholders shall be held to recognize that at such meeting any action authorized under the terms of this Declaration of Trust and of the Agreement of which it forms a part may be taken by the Shareholders.

Special meetings of the Shareholders may be called and held on seven days' notice to be given by the Secretary as in the case of the annual meeting, at the direction of the President or upon the request of a majority of the Trustees, or of shareholders representing at least shares. At special meetings, no business shall be transacted excepting such as is contained in the notice of the meeting, excepting to adjourn. At all meetings each shareholder shall be entitled to one vote for each share held by him in the Association. Any shareholder may vote by proxy.

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A quorum for the transaction of business shall consist of a majority, to be represented in person or by proxy, of the shares of the Association. A less number may adjourn a meeting.

No notice of any regular or special meeting of the shareholders need be given, provided all the registered shareholders are present thereat in person or by proxy, or have in writing waived notice of the meeting.

ARTICLE XIII.

The death of a shareholder or Trustee during the continuance of this Trust shall not operate to determine the Trust, nor shall it entitle the legal representative of the deceased shareholder to an accounting, or to take any action in the courts, or elsewhere, against the Trustees; but the executors, administrators or assigns of any deceased shareholder shall succeed to the rights of said decedent under this Trust upon the surrender of the certificate for shares owned by him. The ownership of shares hereunder shall not entitle the shareholders to any title in or to the Trust property whatsoever, or the right to call for a partition or division of the same. And it is expressly declared and agreed that the shareholders are *Cestuis que Trustent*, and hold no other relation to the Trustees than that of *Cestuis que Trustent* hereunder.

ARTICLE XIV.

The Trustees shall have no power to bind the shareholders personally, and the shareholders and their assigns and all parties whatsoever extending credit to, contracting with, or having any claim against the Trustees shall look only to the funds and property of the Trust for payment under such contract or claim, or for the payment of any debt, damage, judgment or decree; or of any money or property that may otherwise be or become due, payable or transferable to them from the Trustees, so that neither the Trustees nor the shareholders at any time shall be personally liable for such. In every written order, contract or obligation which the Trustees by themselves or by any officer or agent shall give or enter into, it shall be the duty of the Trustees to refer to

EXHIBITS.

this declaration and to stipulate that neither the Trustees nor the shareholders shall be held to any personal liability under or by reason of said order, contract or obligation. For the purpose of protecting themselves as Trustees against any personal liability hereunder, they are expressly authorized as Trustees to enter into such contracts of insurance as to them may seem expedient or advisable.

ARTICLE XV.

The original of this declaration of trust and any amendments hereafter made shall be filed for record in the office of public records in the _____ county of _____ in this state, and after the same has been recorded it shall be kept for safety in such depository as the said trustees may from time to time select.

ARTICLE XVI.

TERM OF TRUST. This trust shall continue for the term of twenty years after the death of the last survivor of the following named persons, to wit :—

At the expiration of which term or at such earlier time as the holders of at least two thirds of the common shares then outstanding may, at a meeting called for that purpose, by vote or resolution appoint, the then trustees shall terminate this trust by selling all property then held by them as such trustees and dividing the proceeds thereof among the shareholders according to their respective holdings and in accordance with and subject to the respective rights and priority of the holders of preferred shares and of common shares as hereinbefore expressed. Provided, however, that upon the request of the holders of at least two thirds of the common shares then outstanding, by vote and resolution thereof, at a meeting of the shareholders called and held for that purpose, the trustees may, if it seems to them judicious so to do, convey the trust property to new or other trustees or to a corporation, according to the terms of such request and in the manner stated therein, being first duly in-

FORM OF RUBBER STAMP USED ON CONTRACTS.

demnified for any outstanding obligations; and the then trustees, upon filing with the _____ County,

Registry of Deeds, their certificate, or that of a majority of their number, that they have complied with such request, shall be under no further obligations, provided further, however, that it is especially understood and agreed that nothing in these provisions contained shall be considered as making it obligatory upon the trustees to comply with such request.¹ For the purpose of winding up its affairs and liquidating the assets of the Trust, the then Board of Trustees shall continue in office until such duties have been duly performed.

ARTICLE XVII.

AMENDMENT OF DECLARATION OF TRUST. This Agreement and Declaration of Trust may be added to, except as regards the liability of the trustees and except as regards the contract between the trustees and the shareholders as to the issue and disposition of new common shares and except as to the respective rights of the holders of preferred and common shares, at any annual or special meeting of the shareholders by vote or resolution of the holders of at least a majority of the common shares then outstanding, provided that notice of the proposed alteration or addition shall have been given in the call for the meeting and that the same is not inconsistent with the acquired rights of any third person or the preferential rights of the holders.

ARTICLE XVIII.

In case any addition, or Amendment to this Declaration of Trust is made by the Shareholders, a copy thereof, duly certified by the Secretary, is to be added to the Declaration of Trust and filed with the Depository herein named, and any other depository where the original Declaration is filed as provided herein.

Form of Rubber Stamp Used on Contracts.

This contract is made and entered into on the part of the _____ Company, the Trustees, under such designa-

¹As to validity or not of this proviso see §§ 96, 97, 171.

EXHIBITS.

tion, and any officer or agent of the same, strictly in accordance with the terms of a Declaration of Trust signed by the Trustees under the same, dated _____ and recorded in the registry of public records Book _____ page _____ in the county of _____ state of _____ which is hereby referred to and made a part of this agreement. As provided therein, all parties whatsoever entering into any contract with the Trustees, shall look only to the funds and property of the Trust, and in no event to the Trustees or shareholders personally, for payment of the same.

EXHIBITS.

CERTIFICATE WITHOUT PAR VALUE.

..... Shares. Shares.

Total Number of Shares 1,500,000.

No. Shares

GREAT NORTHERN IRON ORE PROPERTIES.

Trustees Certificate of Beneficial Interest.

The undersigned, as trustees under a certain indenture entered into between them and the Lake Superior Company, Limited, on the seventh day of December, A. D. One Thousand, Nine Hundred and Six, do hereby certify that

is the owner of Shares of the beneficial interest therein specifically described. This certificate is transferable only upon the books of the trustees in person or by attorney and upon the surrender of this certificate. This certificate shall not become valid until countersigned by the Registrar of Transfers.

In Testimony Whereof, the trustees have signed this certificate this day of, A. D.

.....	}	Trustees.
.....		
.....		
.....		
.....		

By.....

Trustees and Attorneys for the Other Trustees.

Countersigned and registered this day of

....., 19.....

..... TRUST COMPANY.

Registrar of Transfers.

By Secretary.

PLAN OF THE MERCHANTS' BANK.

Note.—The following is taken from the “Works of Hamilton” as published under order of Congress (Vol. VII, pp. 838-844), and is referred to by Senator Verplanck in Warner v. Beers (1804), 23 Wend. 103, 151; see Section 80 of this book. If we change the words “directors” to “trustees”, “stockholders” to “*cestuis que trust*” and the general title of “limited partnership” to “trust”, we have a perfect example of the method of business organizations considered in this book. The Merchants’ Bank operated under this instrument as drawn by Alexander Hamilton until forced to comply with a “Restraining Act of 1804” passed by the New York Legislature and described in “Paine’s Banking Laws,” page 13, as follows: “It enacted that from and after the passing of this act, no person unauthorized by law should subscribe to or become a member of any association, institution or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts or transacting any other business which incorporated banks may or do transact by virtue of their respective acts of incorporation; ‘and if any person unauthorized by law as aforesaid, shall hereafter subscribe or become a member or proprietor as aforesaid, he shall forfeit and pay for every such offense the sum of \$1,000, to be recovered by any person who shall sue for the same, in an action of debt, one-half thereof to his own use, and the other half to the use of the people of this State; and all notes and securities for the payment of money, or the delivery of property, made or given to any such association, institution or company, not authorized as aforesaid, shall be null and void: Provided, nevertheless, that nothing herein contained shall be held in any way to extend to the association in the city of Albany, known by the name of the Mercantile Company, nor the association in the city of New York, known by the name of the Merchants’ Bank, until the first Tuesday in May, 1805’.”

PLAN OF THE MERCHANTS' BANK.

To all to whom these presents shall come, or in any wise concern.

Be it known and made manifest, that we the subscribers, have formed a company or limited partnership, and do hereby associate and agree with each other, to conduct business in the manner hereinafter specified and described, by and under the name and style of the "MERCHANTS' BANK," and we do hereby mutually covenant, declare, and agree, that the following are and shall be the fundamental articles of this our association and agreement with each other, by which we, and all persons who at any time hereafter may transact business with the said company, shall be bound and concluded.

I. The capital stock of the said company shall consist of one million two hundred and fifty thousand dollars, in money of the United States. The said capital stock shall be divided into shares of fifty dollars each: two dollars and fifty cents on each share shall be paid at the time of subscribing, and the remainder shall be paid at such times, and in such proportions as the board of directors shall order and appoint, under pain of forfeiting to the said company the said shares, and all previous payments thereon: but no payment shall be required, unless by a notice to be published for at least fifteen days, in two newspapers printed in the city of New York.

II. The affairs of the said company, shall be conducted by sixteen directors, who shall elect one of their number to be the president thereof, and nine of the directors shall form a board or quorum for transacting all the business of the company, except ordinary discounts, which it shall be in the power of any five of the directors to perform, of whom the president shall always be one, except in case of his sickness or necessary absence, when his place may be supplied by any other director, whom he by writing under his hand, shall nominate for that purpose; and until the second Tuesday in June, one thousand eight hundred and four, Oliver Wolcott, Richard Varick, Peter Jay Munro, Joshua Sands, Thomas Storm, William W. Woolsey, John Hone, John Kane, Joshua Jones, Robert Gilchrist, Wynant Van Zandt, jun., Isaac Bronson, James Roosevelt, John Swartwout, Henry I. Wy-

coff, and Isaac Hicks, shall be directors of the said company; the directors from and after that period, shall be elected for one year by the stockholders, for the time being, and each director shall be a stockholder at the time of his election, and shall cease to be a director if he should cease to be a stockholder: and the number of votes which each stockholder shall be entitled to, shall be equal to the number of shares which he shall have held on the books of the company, for at least sixty days prior to the election; and all stockholders shall vote at elections by ballot, either personally or by proxy; to be made in such form as the board of directors may appoint.

III. A general meeting of the stockholders of the company shall be holden upon the first Tuesday of June, in every year (excepting in June now next ensuing), at such place as the board of directors shall appoint, by notice, to be published in two newspapers printed in the city of New York, at least fifteen days previous to such meeting, for the purpose of electing directors for the ensuing year, who shall take their seats at the board on the second Tuesday in the same month of June, and immediately proceed to elect the president.

IV. The board of directors are hereby fully empowered to make, revise, and alter or annul, all such rules, by-laws, and regulations, for the government of the company, and that of their officers, servants, and affairs as they, or a majority of them, shall from time to time think expedient, not inconsistent with law, or these articles of association; and to use, employ, and dispose of the joint stock, funds or property of the said company (subject only to the restrictions hereinafter contained) as to them, or a majority of them, shall seem expedient.

V. All bills, bonds, notes, and every contract and engagement on behalf of the company, shall be signed by the president; and countersigned or attested by the cashier of the company; and the funds of the company shall in no case be held responsible for any contract or engagement whatever, unless the same shall be so signed and countersigned, or attested as aforesaid.

VI. The books, papers, correspondence and funds of the company, shall at all times be subject to the inspection of the directors.

VII. The said board of directors shall have power to appoint a cashier, and all other officers and servants, for executing the business of the company; and to establish the compensations to be paid to the president and all the other officers and servants of the company respectively; all which, together with all other necessary expenses, shall be defrayed out of the funds of the company.

VIII. A majority of the directors shall have power to call a general meeting of the stockholders, for purposes relative to the concerns of the company; giving at least thirty days' notice, in two of the public newspapers, printed in the city of New York, and specifying in such notice the object or objects of such meeting.

IX. The shares of capital stock, at any time owned by any individual stockholder, shall be transferable on the books of the company, according to such rules as, conformable to law, may be established in that behalf by the board of directors; but all debts actually due and payable to the company, by a stockholder requesting a transfer, must be satisfied before such transfer shall be made, unless the board of directors shall direct to the contrary.

X. No transfer of stock in this company shall be considered as binding upon the company, unless made in a book or books, to be kept for that purpose by the company. And it is hereby further expressly agreed and declared, that any stockholder, who shall transfer in manner aforesaid all his stock or shares in this company, to any other person or persons whatever, shall *ipso facto* cease to be a member of this company; and that any person or persons whatever, who shall accept a transfer of any stock or share in this company, shall *ipso facto* become and be a member of this company, according to these articles of association.

XI. It is hereby expressly and explicitly declared to be the object and the intention of the persons who associate under the style or firm of the "MERCHANTS' BANK," that the joint stock or property of the said company (exclusive of dividends to be made in the manner hereinafter mentioned) shall alone be responsible for the debts and engagements of the said company. And that no person, who shall or may deal with this company, or to whom they shall or may become in any wise indebted, shall on any pretense whatever have recourse against the separate property of any present or future member of this company, or against their persons, further than may be necessary to secure the faithful application of the funds thereof, to the purpose to which by these presents they are liable. But all persons accepting any bond, bill, note, or other contract of this company, signed by the president, and countersigned or attested by the cashier of the company for the time being, or dealing with it in any other manner whatsoever, thereby respectively give credit to the said joint-stock or property of the said company, and thereby respectively disavow having recourse, or any pretense whatever, to the person or separate property of any present or future member of this company, except as above mentioned. And all suits to be brought against this company (if any shall be) shall be brought against the president for the time being; and in case of his death or removal from office, pending any suit against him, measures shall be taken at the expense of the company for substituting his successor in office as a defendant; so that persons having demands upon the company, may not be prejudiced or delayed by that event, or if the person suing shall go on against the person first named as defendant (notwithstanding his death or removal from office), this company shall take no advantage by writ of error, or otherwise, of such proceeding, on that account; and all recoveries had in manner aforesaid, shall be conclusive upon the company, so far as to render the company's said joint stock or property liable thereby, and no further; and the company shall immediately pay the amount of such recovery out of their joint stock, but not otherwise. And in case of any suit at law, the president shall sign his appearance upon the writ, or file com-

mon bail thereto; it being expressly understood and declared, that all persons dealing with the said company agree to these terms, and are to be bound thereby.

XII. Dividends of the profits of the company, or of so much of the said profits as shall be deemed expedient and proper, shall be declared and paid half yearly during the months of May and November in every year, and shall from time to time be determined by a majority of the said directors, at a meeting to be held for that purpose, and shall in no case exceed the amount of the net profits actually acquired by the company; so that the capital stock of the company shall never be impaired by the dividends: and at the expiration of three years, from the first Tuesday of June next, a dividend of surplus profits shall be made, but the directors shall be at liberty to retain at least one per cent, upon the capital, as a fund for future contingencies.

XIII. If the said directors shall at any time, wilfully and knowingly, make or declare any dividend which shall impair the said capital stock, all the directors present at the making or declaring such dividend, and consenting thereto, shall be liable, in their individual capacities, to the company, for the amount or proportion of the said capital stock so divided by the said directors. And each director who shall be present at the making or declaring of such dividend, shall be deemed to have consented thereto, unless he shall immediately enter, in writing, his dissent on the minutes of the proceedings of the board, and give public notice to the stockholders, that such dividend has been declared.

XIV. The articles of agreement shall be published in at least three newspapers, printed in the city of New York, for one month; and for the further information of all persons, who may transact business with, or in any manner give credit to this company, every bond, bill, note, or other instrument or contract, by the effect or terms of which the company may be charged or held liable for the payment of money, shall specially

declare in such form as the board of directors shall prescribe, *that payment shall be made out of the joint funds of the Merchants' Bank, according to the present articles of association, and not otherwise*; and a copy of the eleventh article of this association shall be inserted in the bank book of every person depositing money, or other valuable property, with the company for safe custody, or a printed copy shall be delivered to every such person, before any such deposit shall be received from him. And it is hereby expressly declared, that no engagement can be legally made in the name of the said company, unless it contains a limitation or restriction, to the effect above recited. And the company hereby expressly disavow all responsibility, for any debt or engagement, which may be made in their name, not containing a limitation or restriction to the effect aforesaid.

XV. The company shall in no case be owners of any ships or vessels, or directly or indirectly concerned in trade, or the importation or exportation, purchase or sale of any goods, wares, or merchandise whatever (bullion only excepted), unless by selling such goods, wares and merchandise, as shall be truly pledged to them, by way of security for debts due to the said company.

XVI. If a vacancy shall at any time happen among the directors, by death, resignation, or otherwise, the residue of the directors, for the time being, shall immediately elect a director, to fill the said vacancy, until the next election of directors, to be made according to the second article of these presents.

XVII. This association shall continue until the first Tuesday of June, one thousand eight hundred and fifteen, and no longer; but the proprietors of two thirds of the capital stock of the company may, by their concurring votes, at a general meeting to be called for that express purpose, dissolve the same at any prior period; provided that notice of such a meeting, and of its objects, shall be published in at least three newspapers, to be printed in the city of New York, for at least six months previous to the time appointed for such meeting.

XVIII. Immediately on any dissolution of this association, effectual measure shall be taken by the directors then existing for closing all the concerns of the company, and for dividing the capital and profits, which may remain, among the stockholders, in proportion to their respective interests.

In witness thereof, we have hereunto set our names or firms the seventh day of April, one thousand eight hundred and three.

FORM OF INDENTURE SECURING THE PAYMENT OF NOTES
OR DEBENTURE BONDS OF A BUSINESS TRUST.

INDENTURE, dated as of the _____ day of _____, 19____, made by and between _____ as Trustees under a certain agreement and declaration of trust, dated _____, creating a trust fund called _____ Company, for themselves as such Trustees and other stockholders in the said trust hereinafter called the Promissors, parties of the first part, and _____ Trust Company, a corporation of the State of _____, hereinafter called the Trustee, party of the second part:

WHEREAS, among the provisions of said agreement and declaration of trust are the following: (The term "Trustee" therein referring to the Promissors, parties of the first part, to this Indenture), to-wit:—

Here insert particular or general provision in the declaration of trust authorizing the creation of the note or bond issue.

AND, WHEREAS, this indenture is substantially in the form authorized; and

WHEREAS, the notes to be issued unto and to be secured by this indenture, the coupons for interest annexed thereto, and the certificate to be indorsed thereon are to be in substantially the following form:

(Form of Note.)
No..... \$.....
United States of America.
..... Company, years,
..... per cent. Secured gold note. Due,
19.....

INDENTURE SECURING BOND ISSUE.

The undersigned, not individually, but as trustees under an agreement and declaration of trust, dated _____, 19____, creating a trust called the _____ Company, for value received, hereby promise to pay to the bearer, or if registered, to the registered holder hereof, _____ dollars on the first day of _____, 19____, and to pay interest on said principal sum at the rate of _____ per cent per annum from the _____ day of _____, 19____, payable _____ on the _____ days of _____ of each year, but only upon presentation and surrender, as they shall severally mature, of the coupons annexed hereto. All such payments of both principal and interest shall be made at the office of _____ Trust Company in the City of _____ and State of _____, in gold coin of the United States of America, of or equal to the standard of weight and fineness of the year 19____, and without deduction for any tax or taxes which the undersigned Trustees or a trustee in the trust indenture hereinafter mentioned may be required to pay thereon, or to retain therefrom, under any present or future law or ordinance of the United States or of any State, Territory, County or Municipality, or any other lawful taxing authority therein.

This note is one of a series of notes known as _____ years, _____ per cent, secured gold notes of the _____ Company for an aggregate principal sum not exceeding _____ dollars at any one time outstanding, issued and to be issued under and in pursuance of and all equally secured by, a trust indenture dated _____, 19____, between the undersigned Trustees and the _____ Trust Company, as trustee, to which indenture reference is hereby made for a specification of the property therein assigned and pledged and agreed to be assigned and pledged, as security for the payment of the notes of this series, and the nature and extent of such security.

The entire series of notes at any time outstanding, but not a part thereof, may be redeemed at the option of the Trustees, on notice published at least once a week for _____ successive weeks immediately preceding the date of redemption specified

EXHIBITS.

in such notice in a newspaper published in the City of _____, upon payment, if such redemption be made on or before 19____, of the principal of said notes and the premium of _____ per cent thereon and accrued interest, and upon payment, if such redemption be made after said _____, 19____, and before the maturity hereof of said principal, and a premium of 1 per cent thereon and accrued interest.

If an event of default, as defined in the above mentioned trust indenture, shall occur, the principal of all said notes shall become or declared due and payable in the manner and with the effect provided in said trust indenture.

This note is secured by the undersigned Trustees, not individually, but as trustees in the aforesaid agreement and declaration of trust, dated _____, 19____, to which reference is hereby made; and all personal liability in any present or future Trustee is expressly and strictly limited to the application and distribution of the property from time to time constituting the trust estate, in accordance with the provision of said agreement and declaration of trust and the trust indenture above referred to; and any and all liability of any present or future Trustees (except as aforesaid), or member of the Executive Committee in said agreement and declaration of trust named or provided for, or shareholder or other beneficiary thereunder, is, by the acceptance and as a consideration for the issue and execution hereof, expressly waived by the holders hereof.

The principal and interest in respect of this note shall be payable without regard to any equities between the Trustees and the original or any intermediate holders hereof; the bearer, or if registered, the registered holder hereof, may sue hereon in his own name, and this note shall have all other attributes of a negotiable instrument. Every holder hereof, by accepting this note, assents to the foregoing provisions.

This note shall pass by delivery unless registered in the owner's name, on the books of the undersigned Trustees, at the

INDENTURE SECURING BOND ISSUE.

office or agency in the City of _____, State of _____, and such registration is noted hereon. After such registration, no transfers shall be valid unless made on such books by the registered owner in person, or by his attorney thereunto duly authorized and similarly noted hereon; but this note may be discharged from registration by being transferred to bearer, and thereupon transferability by delivery shall be restored; from time to time this note may again be registered or transferred to bearer as before. No such registration, however, shall affect the negotiability of the coupons which shall continue to be transferable by delivery merely and shall remain payable to bearer. This note shall not become obligatory for any purpose unless and until it shall have been authenticated by the certificate indorsed hereon of the Trustees in said trust indenture.

IN WITNESS WHEREOF, at the City of _____, in the State of _____, the undersigned Trustees have caused their names to be hereunto affixed by one of their agents duly authorized, under the designation of Assistant Treasurer, on the _____ day of _____, 19____.

.....

As Trustees under the agreement and declaration of trust, dated _____, 19____, creating the trust called the _____ Company, and not individually.

By.....
 Assistant Treasurer.

(Form of Interest Coupon.)

No..... \$.....
 On the _____ day of _____, 19____, upon the presentation and surrender hereof, at the office of _____ Trust Company, in the City of _____, the bearer will be entitled to receive _____ dollars, United States gold coin, without deductions for taxes, being _____ months' interest then due on the _____ year _____ per cent secured gold note of the _____ Company, No. _____, unless such note shall have been called for prior redemption.

....., Assistant Treasurer.

EXHIBITS.

(Form of Trustee's Certificate.)

This is one of the notes described in the within mentioned trust indenture.

..... Trust Company, Trustee.

By

AND, WHEREAS, all acts and things prescribed by the aforesaid agreement and declaration of trust dated , to make said year per cent secured gold notes, when secured by the promisors and authenticated by the Trustees, valid, legal and binding obligations, and to make this indenture a valid, legal and binding agreement for the security thereof, have been duly performed and complied with:

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That in consideration of the premises and of the purchase and acceptance of such notes by the holders thereof, and of the sum of \$1.00 to the Promisors by the Trustees at or before the ensealing and delivery of these presents, receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all such notes at any time issued and outstanding in this indenture, according to their tenor and effect, and the performance of all covenants herein contained, and to declare the terms and conditions upon which such notes shall be issued, received, and held, the Promisors have executed and delivered these presents, and have sold, pledged, assigned, transferred and set over, unto the Trustee, party of the second part, its successors and assigns forever, the following property, that is:

Here insert description of property pledged to secure notes.

TO HAVE AND TO HOLD the properties hereby assigned and pledged, or intended to be assigned and pledged, or here-

INDENTURE SECURING BOND ISSUE.

after to be assigned and pledged, unto the Trustee, its successor or successors and assigns, forever:

BUT IN TRUST, NEVERTHELESS, for the equal and proportionate benefit and security of each and every present and future holder of any of the notes, or the coupons thereto appertaining, issued under and secured by this indenture, and for the enforcement of the payment of said notes and coupons, when due, according to their tenor, purport and effect, and the performance of, and the compliance with, the covenants and conditions of said notes and of this indenture, without preference, priority or distinction, as to lien, or otherwise, of any of said notes over any of the others of said notes issued hereunder, by reason of priority in the time of issue or negotiation thereof, or otherwise howsoever, so that each and every note issued or to be issued hereunder shall have the same right, lien and priority under and by virtue of this indenture as if all of said notes had been duly issued and negotiated simultaneously with the execution and delivery of this indenture.

AND IT IS HEREBY EXPRESSLY COVENANTED, that any and all personal liability of the Promisors in connection with this indenture or the notes issued hereunder shall be expressly and strictly limited to the application and distribution, in accordance with the provisions of the agreement and declaration of trust, dated , 19 , and hereof, of the property from time to time constituting the trust estate; that any and all liability of the Promisors (except as aforesaid), or member of the Executive Committee in said agreement and declaration named or provided for, or shareholder or other beneficiary thereunder, is expressly waived by the takers and holders of said notes, who, by such taking, agree that the same shall be payable only out of the property from time to time constituting the trust estate; and that all such notes, and the coupons for interest thereon, are to be issued, authenticated, delivered, received and negotiated, and that the securities pledged hereunder are to be held by the

EXHIBITS.

Trustee, subject to the following further trusts, covenants, conditions and provisions, viz:

ARTICLE FIRST.

Section 1. The amount of notes to be issued hereunder which may be executed by the Promisors, and which may be authenticated by the Trustee, shall never exceed the aggregate principal sum of \$. at any one time outstanding.

The notes to be issued hereunder shall from time to time be signed by the Promisors, as Trustees under said agreement and declaration of trust, dated , 19 , and not individually, or such notes bearing the name of each of the Promisors, as such Trustees, shall be signed by one of their agents duly appointed as hereinafter provided in section 1 of Article Sixth hereof, and such notes shall then be delivered for authentication to the Trustee; and thereupon, the said notes shall be authenticated and delivered as is provided in sections 3 and 4 of this Article First and not otherwise.

In case any of the trustees in whose names any of the said notes shall have been signed shall cease to be trustees or trustee under said agreement and declaration of trust dated , 19 , and thereby shall cease to be Promisors or Promisor hereunder, or in case any agent who, on behalf of the Promisors, shall have signed any of said notes shall cease to be such agent, before the notes so signed shall have been actually executed, and authenticated and delivered by the Trustee, such notes may nevertheless be executed, and when so executed may be issued, authenticated and delivered as though the said three persons in whose names such notes had been signed, or the agent who had signed such notes on behalf of the Promisors, had not ceased to be such trustees and Promisors, or Trustee and Promisor, or such agent, as the case may be. And any note may be signed on behalf of the Promisors by the person who shall be their agent at the actual time of such signature, although at the time of the date of the note such person shall not have been the agent of the Promisors.

The coupons for interest on said notes shall be authenticated by the fac-simile signature of any present or future agent of the Promisors, and for that purpose the Promisors may adopt and use the fac-simile signature of any present or future agent, notwithstanding the fact that he may have ceased to be such agent at the time when such notes shall be actually issued, authenticated and delivered.

Section 2. Only such of said notes as shall bear thereon a certificate substantially in the form hereinbefore recited, duly signed by the Trustee, shall be secured by this indenture, or shall be entitled to any lien or benefit hereunder. No such note or any coupon thereunto appertaining shall be valid for any purpose unless and until such certificate shall have been duly indorsed on such note. Such certificate of the Trustee upon any notes signed by or on behalf of the Promisors shall be conclusive and the only evidence that the note so authenticated was duly issued hereunder, and is entitled to the benefit of the trust and security hereof.

Section 3. The Promisors shall keep at an office in the City of _____ and State of _____, proper books wherein they will, upon presentation of any of the notes for such purpose and under such reasonable regulations as they may prescribe, register, or transfer said notes. Such registration shall be noted on the note, after which no transfer shall be valid unless made by the registered holder in person or by his attorney duly authorized, and similarly noted on the note, but any note may be discharged from registration by being in like manner re-transferred to bearer, after which it shall be transferable by delivery; and such notes may again and from time to time be registered or transferred to bearer as before. No such registration shall affect the negotiability of the coupons appertaining to any note, but the coupons shall continue to be transferable by delivery and shall remain payable to bearer.

For any transfer or registration under the provisions of this Section 3, the Promisors may require the payment of a sum

EXHIBITS.

sufficient to reimburse them for any stamp tax or other governmental charges.

The person in whose name any note shall be registered shall for all purposes of this indenture be deemed and regarded as the owner thereof, and thereafter payment of the principal of such registered notes shall be made only to or upon the order of such registered holder thereof. All such payments shall be valid and effectual to satisfy and discharge liability upon such notes to the extent of the sum or sums so paid. The Promisors and the Trustee may deem and treat the bearer of any note which shall not at any time be registered and the bearer of any coupon for interest upon any note, whether such note shall be registered or not, as the absolute owner of such note or coupon for the purpose of receiving payment thereof and for all other purposes whatsoever, and the Promisors and the Trustee shall not be affected by any notice to the contrary.

Section 4. Until the definitive notes can be prepared the Promisors may sign and the Trustee shall authenticate and deliver, in lieu of such definitive notes and subject to the same provisions, limitations and conditions, temporary typewritten, printed or lithographed notes, substantially of the tenor of the definitive notes, except that no coupons shall be attached to any of such temporary notes and that each of such temporary notes may be for one thousand dollars of principal or any multiple thereof. Each such temporary note shall bear upon its face the words "Temporary Year Per cent. Secured Gold Note," and shall be authenticated by the Trustee in like manner as hereinabove provided for the definitive notes; and the authentication by the Trustee shall be the only and conclusive evidence that the note so authenticated has been duly issued hereunder and that the holder is entitled to the benefit of this indenture.

Such temporary notes shall be exchangeable, without charge or expense to the holder, for a like aggregate face amount of temporary notes of such different denominations, as the Promis-

ors may issue, or for a like aggregate face amount of definitive notes when the same are ready for delivery, and upon the surrender of any such temporary notes for exchange such temporary notes shall forthwith be canceled by the Trustee and delivered to the Promisors on their written demand, and the Promisors thereupon, but only after such surrender and cancellation, at their own expense shall issue and the Trustee shall authenticate and deliver in exchange therefor, temporary or definitive notes for the same aggregate face amount as the temporary notes surrendered. Until so exchanged, each of said temporary notes in all respects shall be entitled to the lien and security in this indenture as if it were a definitive note issued and authenticated hereunder; and interest thereon when and as payable shall be paid and such payment indorsed thereon.

Section 5. In case any note issued hereunder shall become mutilated or be destroyed or lost, the Promisors, in their discretion, and on such terms as they may prescribe, may execute and thereupon the Trustee shall authenticate and deliver in substitution therefor a new note of like tenor and amount and bearing the same serial number as the note so mutilated, destroyed or lost. In case of mutilation the applicant for such new note and coupons shall surrender the mutilated note and the coupons appertaining thereto for cancellation. In case of destruction or loss the applicant for new note and coupons shall furnish to the Promisors and also to the Trustee evidence satisfactory to them of the destruction or loss of such note and coupons, and also such security or indemnity as may be required by the Promisors and the Trustee.

ARTICLE SECOND.

The Promisors, as trustees under the aforesaid agreement and declaration of trust, dated _____, 19____, and not individually, covenant and agree, so long as any of the notes issued under this indenture, or the interest to accrue thereon, shall be outstanding or unpaid, that

Section 1. They will duly and punctually pay the principal

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of and interest on every note issued hereunder, according to the terms thereof. The principal amount, and the premium thereon, if any, of each such note shall be payable only upon presentation and surrender thereof at the office of

Trust Company, in the City of . The interest shall be payable at the office of

Trust Company, but only upon presentation and surrender of the coupons therefor as they severally mature, and when and as paid all such coupons shall forthwith be cancelled by the Trustee.

In order to prevent any accumulation of coupons appertaining to the secured notes after maturity, the Promisors will not, directly or indirectly, extend or assent to the extension of the time for payment of any said coupons; and the Promisors will not, directly or indirectly, be parties to or approve any such arrangement by purchasing or funding said coupons or in any other manner.

Section 2. Whenever demanded by the Trustee, they will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all such further acts, deeds, transfers and assurances as the Trustee may reasonably require for the better assuring and confirming unto the Trustee all and singular the securities pledged hereunder or intended so to be or for better accomplishing the provisions and purposes of this indenture or effectuating the intention hereof or for securing the payment of the principal and interest of the notes issued hereunder.

ARTICLE THIRD.

The entire series of the notes issued hereunder and at any time outstanding, but not a part thereof, may be redeemed at the option of the Promisors on any interest payment date upon notice published at least once a week for successive weeks immediately preceding the date of redemption specified in such notice, in a newspaper of general circulation published in the of . If such date

of redemption shall be on or before 19 ,
the Promisors shall pay, as hereinafter provided, the principal
of such notes, a premium of per cent thereon and ac-
crued interest, and if such date shall be after said ,
19 , and prior to the maturity of said notes, the Promisors
shall pay, as hereinafter provided, the principal of such notes,
a premium of per cent thereon and accrued interest.
On or prior to the date fixed for such redemption the Promisors
shall deposit with the Trustee a sum of money equal to the face
amount of said notes, together with the premium thereon and in-
terest accrued thereon to said date of redemption so fixed. In
case notice of redemption shall have been published as aforesaid,
and said sum of money shall be so deposited with the Trustee,
interest on said notes shall cease from and after said date of
redemption. On and after said date the holders of said notes
may present the same at the office of the Trustee and receive
payment therefor out of the funds so deposited by the Promisors
at the rate above provided. Said notes so redeemed shall not
be re-issued, but shall be canceled by the Trustee upon payment
thereof and delivered when so canceled to the Promisors upon
their request. In case the Promisors shall not, on or prior to
the date fixed for such redemption, deposit with the Trustee the
sum of money sufficient to enable the Trustee to pay all such
notes in the manner above stated, interest shall continue to run
on said notes, and said notes, together with the interest accrued
thereon, shall thereupon at the election of the respective holders
thereof, be due and payable.

ARTICLE FOURTH.

Section 1. If one or more of the following events, hereinafter
termed the events of default, shall happen, that is to say,

(a) Default shall be made by the Promisors in the punctual
payment of any part of the principal of the notes issued here-
under, as and when the same shall become due and payable, or

(b) Default shall be made by the Promisors in the punctual
payment of any part of any instalment of the interest on said

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notes, as and when the same shall become due and payable, and such default shall continue for a period of thirty days, or

(c) Default shall be made in the performance of any of the covenants, promises or agreements, on the part of the Promisors herein contained or referred to, to be by them kept or performed, and any such last-mentioned default shall continue for a period of thirty days after demand in writing by the Trustee for such performance;

Then and in every such case the Trustee may, and if thereunto requested in writing by the holders of a majority in interest of said notes then outstanding, shall

(a) If the principal of said notes be not already due and payable by the terms thereof, by written notice to the Promisors declare such principal, to be, and the same shall forthwith become, due and payable;

(b) Collect and receive all dividends, interest, income and revenues on or from the securities pledged hereunder;

(c) Personally or by attorney, sell to the highest bidder all or any of the securities pledged hereunder at any brokers' board, or at any public or private sale, free from any claim of the Promisors in law or in equity, in one lot and as an entirety, or in separate lots, which said sale or sales may be held at such place or places, and at such time or times as the Trustee may determine, and which said sale or sales may be conducted in such manner generally as the Trustee may deem to the best advantage of the holders of the notes issued hereunder;

(d) Proceed to protect and enforce its rights and the rights of holders of the notes issued hereunder by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy as the Trustee, being advised by counsel,

shall deem most effectual to protect and enforce its rights and the rights of the holders of said notes.

Section 2. In case the Trustee shall have proceeded to enforce any right under this indenture by foreclosure or otherwise, and such proceeding shall have been discontinued or abandoned, for any reason, or shall have been determined adversely to the Trustee, then and in every such case the Promisors and the Trustee shall be restored to their former positions and rights hereunder in respect of the securities pledged hereunder, and all rights, remedies and powers of the Trustee shall continue as if no such proceedings had been taken.

Section 3. Whenever any public sale is made pursuant to any provision of this indenture, notice of such sale shall state the time and place, or times and places, when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be deemed sufficient if published once in each week, for successive weeks, prior to such sale, in a newspaper published in the of

From time to time the Trustee may adjourn any public sale to be made by it under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales, and, without further notice or publication, it may make such sale at the time and place to which the same shall be so adjourned.

Upon the completion of any sale or sales under this indenture the Trustee shall deliver to the accepted purchaser or purchasers the shares of stock or other property sold and may execute sufficient transfers thereof, and the Trustee and its successors are hereby appointed the true and lawful attorney or attorneys irrevocable of the Promisors, in their name and stead to make the necessary assignments, transfers and conveyances of the bonds, shares of stock, or other property thus sold.

Any sale or sales made under or by virtue of this indenture,

EXHIBITS.

whether under the power of sale hereby granted and conferred or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever, either in law or in equity, of the Promisors of, in and to the property so sold, and shall be a perpetual bar both at law and in equity against the Promisors, their successors and assigns, and against any and all persons claiming or to claim the property sold, or any part thereof, from, through or under the Promisors, their successors or assigns.

The receipt of the Trustee shall be a sufficient discharge to any purchaser or purchasers of the property, or any part thereof, sold as aforesaid, for the purchase money; and no such purchaser, nor his representatives, vendees or assigns, after paying such purchase money and receiving said receipt, shall be bound to see to the application of such purchase money in accordance with the terms of this indenture, or shall be bound to inquire as to the authorization, necessity or regularity of any such sales.

In case of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, the principal of all the notes issued hereunder and then outstanding, if not previously due by declaration or otherwise, shall become due and payable forthwith, anything in said notes or in this indenture contained to the contrary notwithstanding.

The purchase money, proceeds or avails of any such sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, together with any other sums which then may be held by the Trustee or be payable to it under any of the provisions of this indenture as part of the trust estate or the proceeds thereof, shall be applied as follows:

(a) To the payment of the costs and expenses of such sale, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and of all expenses, liabilities and advances made or incurred by the Trustee under this indenture and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessments or other superior liens, subject to which such sales shall have been made;

(b) Any surplus then remaining, to the payment of the whole amount owing and unpaid upon the notes issued hereunder or any of them, for principal and interest, with interest at the rate of six per cent per annum on the over due instalments of interest; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said notes, then to the payment of such principal and interest due upon said notes, ratably, without reference or priority of principal over interest, or of interest over principal, or of any instalment of interest over any other instalment of interest;

(c) Any surplus then remaining, to the payment to the Promisors, their successors, or assigns, or whomsoever may lawfully be entitled to receive the same.

Section 4. Upon any such sale of the securities, or any part thereof, pledged hereunder or any part thereof whether under the power of sale hereby granted and conferred, or pursuant to judicial proceedings, any purchaser, in settlement or payment of the purchase price of the property purchased, shall be entitled to use, and apply toward the payment of the purchase price, any notes issued hereunder and any matured and unpaid coupons appertaining thereto, by presenting such notes and coupons in order that there may be credited thereon the sums applicable to the payment thereof under section 3 of this Article; and such purchaser thereupon shall be credited, on account of such purchase price payable by him, with the sums so applicable to the payment of, and credited on the notes or coupons so presented; and, at any such sale, any holders of the notes issued hereunder or the Trustee may bid for and purchase such property, and may make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain and dispose of such property without further accountability.

Section 5. No holder of any note issued hereunder shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust or power hereof or for any other remedy here-

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under, or in respect of the securities pledged hereunder, unless such holder previously shall have given to the Trustee written notice of default and of the continuance thereof for the period, if any, specified therefor as in section 1 of Article Fourth of this indenture; nor unless, also, the holders of a majority in interest of the notes issued hereunder, then outstanding, shall have made written request upon the Trustee after the happening of such default, and the continuance thereof, if any, as aforesaid, and shall have afforded to it a reasonable opportunity either to proceed to exercise the powers of sale hereinbefore granted or to institute such action, suit or proceeding in its own name, nor unless, also, they shall have offered to the Trustee adequate security and indemnity against the costs and expenses to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this indenture, and to any action or cause of action for foreclosure or for any other remedy hereunder; it being understood and intended that no one or more holders of notes shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding notes. In no event shall the custody and holding of the securities pledged hereunder be in anywise disturbed. But the foregoing provisions of this section shall not be construed to affect any discretion or power by any provision of this indenture given to the Trustee to determine whether or not it shall take action in respect of any default without such notice or request from the note holders, or affect any other discretion or power given to the Trustee.

Section 6. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustee, or to the holders of notes issued hereunder is intended to be exclusive of any other remedy, but each and every such remedy

INDENTURE SECURING BOND ISSUE.

shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

Section 7. No delay or omission of the Trustee, or of any holders of notes issued hereunder, to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein or shall extend to any subsequent default; and every power and remedy given by this Article to the Trustee, or to the holders of the notes, may be exercised from time to time, and as often as may be deemed expedient, by the Trustee or by the holders of the notes.

ARTICLE FIFTH.

Anything to the contrary herein notwithstanding, it is expressly understood and agreed that this indenture and the notes issued hereunder are executed by the Promisors, not individually, but as Trustees under the agreement and declaration of trust hereinbefore mentioned, dated _____, 19____, to which reference is hereby made, and that any and all liability of the Promisors shall be expressly and strictly limited to the application and distribution, in accordance with the provisions of said agreement and declaration of trust, and hereof, of the property from time to time constituting the trust estate, and any and all personal liability of the Promisors (except as aforesaid), the Executive Committee, the shareholders and all beneficiaries under said agreement as therein mentioned, is, by the acceptance of said notes and as a consideration for the issue and execution thereof and of this indenture, expressly waived by the holders of any and all notes issued hereunder; it being further understood and agreed that the payment of the principal of and the interest on said notes shall only be sought for and enforceable against and collected out of the property from time to time constituting the trust estate created by said agreement and declaration of trust.

ARTICLE SIXTH.

Section 1. From time to time, the Promisors as trustees under

EXHIBITS.

the said agreement and declaration of trust, dated _____, 19____, may execute, and may file with the Trustee, a writing appointing any person or persons, or any copartnership or corporation, the agent or agents of the Promisors, under such designation as they may determine and specify, in the name, place and stead of the Promisors, to sign any note or coupon to be issued under this indenture, or to sign any order or authority to deliver any such note, when authenticated, or to sign any other order or authority which the Promisors themselves might sign; and thereupon the Trustee shall be authorized to authenticate any note or notes authorized to be issued hereunder, which shall have been signed by such agent or agents in the name of the Promisors, and to deliver any such note, when authenticated, upon the order in writing of such agent or agents, or to release and surrender any or all the securities, pledged hereunder, and to do and perform any act or to take any proceeding which, pursuant to the provisions of this indenture, the Trustee is authorized to perform or to take upon the written order of the Promisors.

From time to time the Promisors may revoke any such appointment previously made, and may appoint a substitute or substitutes with like power and authority; but no such revocation shall operate to annul, or in anywise to affect, any act or proceeding done or taken by any agent or agents previous to such revocation of authority and service of notice in writing thereof upon the Trustee, or shall operate to annul, or in anywise to affect, any act or proceeding done or taken by the Trustee pursuant to the order of any agent or agents appointed or theretofore appointed as provided in this section, of the revocation of whose authority notice in writing shall not have been given to the Trustee as aforesaid.

_____ and _____ are each hereby appointed the agent of the Promisors, as trustees under said agreement and declaration of trust dated _____, 19____, in behalf of the Promisors, and under the designation of "Assistant Treasurer" to sign any note authorized to be issued under this indenture, and until the revocation of his appointment as such agent in the manner above provided, each one of

them may and is authorized to exercise the aforesaid powers of such agent under the designation above specified, without any further act or appointment hereunder. The fac-simile signature of either of such agents under the designation of "Assistant Treasurer" is hereby adopted for the purpose of authenticating the coupons appertaining to said notes.

The death of the Promisors, or any of them, or of any successor to them, shall not operate to revoke any agency created pursuant to the provisions of this section.

Section 2. For every purpose of this indenture, including the execution, issue and use of any and all notes hereby secured, the term "Promisors" includes and means not only the parties of the first part hereto but also their successors as trustees under the said agreement and declaration of trust, dated

19 , and the survivors or survivor of them. Such successors and such survivors and survivor shall possess and from time to time may exercise each and every right and power hereunder of the Promisors, in the name of the Promisors or of the said successors, survivors or survivor.

Whenever any Trustee shall cease to act as such under the agreement and declaration of trust, dated , 19 , he shall without any further act, cease to be a Promisor hereunder, and the election of any successor Trustee under said agreement and declaration of trust, dated , 19 , shall, without any further act, constitute such successor a Promisor hereunder, as if herein specifically mentioned as one of the parties of the first part.

Section 3. This agreement shall be deemed to be and shall be construed as a contract of the State of , and all the rights of the parties hereto and of the holders of the notes issued hereunder shall be governed and determined according to the laws of the State of .

Section 4. This indenture is executed in counter parts each of which so executed shall be deemed to be an origi-

EXHIBITS.

nal, and such counterparts shall together constitute but one and the same instrument.

IN WITNESS WHEREOF, at the
of _____, in the State of _____,
_____, and
_____, as Trustees under said agreement and
declaration of trust dated _____, 19_____,
and as parties hereto of the first part, have hereunto caused their
names and seals to be hereunto affixed, and
Trust Company, party hereto of the second part, in token of
the acceptance of the trust hereby created, has caused this agree-
ment to be signed by its President or Vice-President and its cor-
porate seal to be hereunto affixed and attested by its Secretary
or an Assistant Secretary as of the day and year first above
written.

..... (L. S.)

..... (L. S.)

..... (L. S.)

As Trustees under the agreement and
declaration of trust, dated
19_____, creating the trust therein called
the _____ Company, and
not individually.

..... Trust Company.

By _____,

President.

Attest:

.....,

Secretary.

Acknowledgments before Notary.

MINUTES OF CESTUIS' MEETING.

FORM OF CESTUIS' MEETING, PURSUANT TO NOTICE, WHICH WAS
GIVEN IN ACCORDANCE WITH THE AGREEMENT OF TRUST.

The annual meeting of the shareholders, *i. e.*, *cestuis que trustent*, of the _____ was held at the time and place named in said notice _____, namely, _____ on _____, 19____, at _____ o'clock. President _____ in the chair.

The Secretary read the call for the meeting.

The records of the last annual meeting of the shareholders, held _____, were read and approved.

On motion duly made and seconded, it was

VOTED that a committee of three be appointed by the chair to examine all proxies and receive, sort and count all votes at the meeting.

The chair appointed as such committee Messrs.

On motion duly made and seconded, it was

VOTED that the reading of the _____ annual report of the trustees to the shareholders be dispensed with, and that said report be accepted, approved and placed on file.

(Copy of the report is annexed to record of the meeting.)

On motion duly made and seconded, it was

VOTED to proceed to the election by written or printed ballots of _____ trustees to serve for the term of _____ years next ensuing.

The ballots being cast, were collected and counted by the

EXHIBITS.

committee previously appointed, which committee reported, through its chairman as follows:

That the number of votes cast was:

Preferred Shares

Common Shares

Total and

that the following persons had thus received the total number of votes cast, namely,

The total number of shares outstanding being as follows:

Preferred

Common

Total

And the number necessary for a quorum and an election being , the chair declared the above named persons duly elected to serve for the term of years next ensuing.

On motion duly made and seconded, it was

VOTED that the acts and doings of the trustees for the past year, as the same appear of record be approved, ratified and confirmed.

No further business having come before the meeting it was

VOTED that the annual meeting of the shareholders of the , be dissolved.

And the meeting was accordingly dissolved.

A true record

.....

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